91-1491

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

HAROLD W. CLARKE, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioner,

v.

CAREY DEAN MOORE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the State of Nebraska's sentencing statute applicable to cases of murder in the first degree which contains the aggravating circumstance "the murder manifested exceptional depravity by ordinary standards of morality and intelligence", as defined by the rulings of the Nebraska Supreme Court to include a killing "so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life," violate the Eighth and Fourteenth Amendments for vagueness in the context of judicial sentencing.

LIST OF ALL PARTIES

The parties to these proceedings are the petitioner, Harold W. Clarke, the Director of the Nebraska Department of Corrections and custodian of the respondent, Carey Dean Moore, a prisoner of the State of Nebraska under sentence of death.

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No. _____

In The

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HAROLD W. CLARKE, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioner,

v.

CAREY DEAN MOORE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner Harold W. Clarke respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on May 25, 1990.

OPINIONS BELOW

The decision of the Court of Appeals for the Eighth Circuit from which this action arises is reprinted in the appendix hereto, 1a, infra, and may also be found as *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990).

The Memorandum of Decision from the United States District Court for the District of Nebraska in case #CV84-L-754 is not reported and is reproduced in the appendix hereto, 28a, infra.

The opinion of the Nebraska Supreme Court in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982) is reprinted in the appendix hereto, 38a, infra.

GROUNDS FOR JURISDICTION

Federal jurisdiction was originally invoked under 28 U.S.C. § 2254. The district court granted relief to the petitioner and an appeal was taken to the Court of Appeals for the Eighth Circuit.

The appeal was submitted on June 16, 1989 and the Court of Appeals filed its opinion on May 25, 1990.

A motion for rehearing was timely filed and the Court of Appeals filed its order denying that motion on Dec. 12, 1991.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment.

The Constitution of the United States, Article VIII.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Constitution of the United States, Article XIV, Section 1.

Neb. Rev. Stat. Section 29-2523 (Reissue 1989). The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

* * *

(d) The murder was especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence.

STATEMENT OF THE CASE

The respondent in this action, Carey Dean Moore (hereinafter "Moore"), was charged and convicted of two counts of first degree murder in the killings of Omaha, Nebraska cab drivers Reuel Eugene Van Ness, Jr. on Aug. 22, 1979, and Maynard D. Helgeland on Aug. 27, 1979. Both murders were committed as an integral part of a pre-conceived scheme to rob cab drivers in the Omaha area.

After his capture, Moore confessed to the crimes in question. Moore waived a jury and was tried and found guilty by the state trial court. Pursuant to Neb. Rev. Stat. § 29-2520 *et seq.* (Reissue 1989), a three-judge panel, including the trial judge, was convened to determine the appropriate punishment for the crimes in question. On June 20, 1980, Moore was sentenced to death for both killings.

The sentencing panel found the existence of two statutory aggravating circumstances in the killing of Van Ness, and three aggravating circumstances in the killing of Helgeland. The court found no statutory mitigating circumstances to exist and no additional evidence offered in mitigation which would, on balance, render a sentence of death inappropriate in either case. See Appendix 65a.

Only one of the aggravating circumstances found to exist in both murders is at issue here. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989), defines as an aggravating circumstance a murder which "manifested exceptional depravity by ordinary standards of morality and intelligence."

In *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982) *cert. den.* 456 U.S. 984 (1982) the Nebraska Supreme Court considered these convictions and sentences on Moore's mandatory appeal. Moore assigned as error the vagueness of aggravating circumstance (1)(d) as being in violation of the Eighth and Fourteenth Amendments but that argument was rejected and the convictions and sentences were affirmed.

Moore subsequently sought state statutory post conviction relief without success. *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984).

On Nov. 14, 1984, Moore filed his petition seeking federal habeas corpus relief. On Sept. 20, 1988, the district court found that Nebraska's aggravating circumstance (1)(d) violated the Eighth and Fourteenth Amendments and granted Moore habeas corpus relief on that sole ground.

An appeal was taken to the Court of Appeals for the Eighth Circuit which, on a 2-1 vote of the panel, affirmed the ruling of the district court with respect to aggravating circumstance (1)(d) on May 25, 1990. A motion for rehearing was filed, briefed and argued. On Dec. 12, 1991 the motion for rehearing was denied and this application follows.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN *PROFFITT v. FLORIDA* AND *WALTON V. ARIZONA*

We believe that the decision of the Circuit Court to allow habeas corpus relief is contrary to the previous rulings of this court in *Proffitt v. Florida*, 428 U.S. 242 (1976), *Walton v. Arizona*, ___ U.S.___, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990) and *Lewis v. Jeffers*, ___ U.S. ___, 111 L.Ed.2d 606, 110 S.Ct. 3092 (1990).

We also note that this court has recently granted a writ of certiorari to the Florida Supreme Court on a similar issue in *Sochor v. Florida*, #91-5843 (cert. granted September 16, 1991).

A.

State court interpretation of aggravating circumstance (1)(d)

Once a criminal defendant has been found guilty of murder in the first degree, Neb. Rev. Stat. § 29-2523 (Reissue 1989) sets forth the aggravating and mitigating circumstances to be considered by the sentencing judge or the panel of sentencing judges appointed to hear the penalty phase of the proceeding. Subsection (1) of that statute defines the statutory aggravating circumstances. Subsection (1)(d) reads:

> The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence.

The Nebraska Supreme Court has interpreted this statutory language to define two distinct sets of circumstances which might establish the existence of this aggravating circumstance. In this case, the sentencing panel found only the second element of aggravating circumstance (1)(d) applicable to the two homicides in question.

In independently reviewing the sentencing panel's finding of this aggravating circumstance on direct appeal the Nebraska Supreme Court stated:

> Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court,

> describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. . . . The second circumstance [which was found to be present in this case] pertains to the state of mind of the actor. In *State v. Stewart* [197 Neb. 497, 250 N.W.2d 849 (1977)], we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court). The sentencing panel found the second circumstance did apply. We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft of regard for human life (1) the murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable that a younger life.

State v. Moore, Appendix 51a-52a.

B.

The requirements of the Eighth and Fourteenth Amendments

The question presented is whether the interpretation of the second prong of Nebraska's aggravating circumstance (1)(d) was impermissibly vague under the Eighth and Fourteenth Amendments as applied to the sentences imposed upon Moore for the two homicides he committed.

In areas this complex it is often helpful to step back to determine the constitutional evil which this Court set out to remedy at the outset of litigation. In *Furman v. Georgia*, 408 U.S. 238 (1972) the death penalty in question was reversed because the decision as to whether an individual convicted of first degree murder should recieve a sentence of death or a less significant punishment for his crime was *absolutely* without standards. In *Gregg v. Georgia*, 428 U.S. 153 (1976) this Court stated that what the Eighth and Fourteenth Amendments required of the states is a statutory sentencing scheme which minimized the risk of *wholly arbitrary and capricious action* in the imposition of this particular criminal sanction.

At the other end of the spectrum, it must be recognized that neither legislatures nor courts can or should be required to anticipate with particularity every deviant method of, means of, or motivation for inflicting death upon another human being. Therefore, in attempting to describe those circumstances under which a homicide might correctly be deemed so abhorrent as to deserve the punishment of death and to distinguish it from homicides in which a lesser penalty is appropriate, some level of

generic description of aggravating circumstances is necessary lest we appropriately sentence all but the most creative killers among us.

We believe the desire to appropriately balance these concerns is reflected in such decisions of this Court as *Walton v. Arizona*, ___ U.S.___, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990); *Lewis v. Jeffers*, ___ U.S. ___, 111 L.Ed.2d 606, 110 S.Ct. 3092 (1990) and *Proffitt v. Florida*, 428 U.S. 242 (1976). As this Court noted in *Proffitt*:

> While [statutory aggravating circumstances] are *by necessity somewhat general*, they do provide guidance to the sentencing authority and thereby reduce the liklihood that it will impose a sentence that fairly can be called capricious and arbitrary.

Id. at 193. (Emphasis added)

> We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors.

Barclay v. Florida, 463 U.S. 939, 950 (1983). As this Court noted in *Walton*, these are not definitional matters "susceptible of mathematical precision." *Id.* 111 L.Ed.2d at 529.

Yet we must conclude that the Circuit Court has not attempted to recognize that reality, but has instead opted to impose unnecessarily stringent standards in evaluating the constitutionality of the second element of Nebraska's aggravating circumstance (1)(d), and as such attempts to thwart its otherwise measured and judicious application.

C.

The Circuit Court Opinion

The Circuit Court, in our opinion, erred in at least two particulars in affirming the habeas corpus relief ordered by the United States District Court below. First, it applied in its analysis of the constitutional requirements of aggravating circumstances the more stringent standard applicable to jurisdictions in which juries are called upon to establish the sentence of the criminal defendant. In Nebraska the appropriate sentence for a criminal defendant convicted of first degree murder is determined by a panel of three judges. Second, the Circuit Court appeared to conclude that it was impermissible for an aggravating circumstance to be based upon determinations which are "subjective", regardless of whether they effectively guide the sentencing court's discretion.

Judicial Sentencing

The Circuit Court's opinion below relied upon Eighth and Fourteenth Amendment standards announced in this Court's opinions in *Godfrey* and in *Maynard v. Cartwright*, 486 U.S. 356 (1988). See *Moore v. Clarke*, Appendix 12a-14a. This same type of analysis was urged upon this Court by the prisoner in *Walton* and rejected. But the logic of [*Godfrey* and *Maynard*] has no place in the context of sentencing by a trial judge.

> Trial judges are presumed to know the law and apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved"

> aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor. Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons v. Mississippi*, 494 U.S. ___, 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether land determine whether any remaining circumstances are sufficient to warrant the death penalty.

Id., 111 L.Ed.2d at 528. The roles of the sentencing trial judges and the appellate courts in the Nebraska and Arizona systems are indistinguishable insofar as is relevant to this question. Again, as this Court noted in *Proffitt:*

> Where the sentencing authority is required to specify what factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

Supra, at 194.

In 1982, while affirming Moore's conviction and sentence with respect to aggravating circumstance (1)(d), the Nebraska Supreme Court engaged in an extensive analysis of the decision in *Godfrey v. Georgia*, 446 U.S. 420

(1980) and as this Court did in *Walton* distinguished Moore's situation from that reversed in *Godfrey* in the following manner:

> The holding of the U. S. Supreme Court in *Godfrey* clearly does not control in the case before us for a number of reasons. *First, the sentencing panel in the case a bar made very specific findings by way of meticulous analysis of the evidence and careful application of the statute as well as this court's prior interpretations thereof. The panel is not an uninstructed jury.* Second, the imposition of the death penalty in the case before us did not rest wholly upon a finding of the existence of aggravating circumstance (1)(d) of § 29-2523, which we will discuss in more detail later since it is the heart of the defendant's argument. Instead, the sentence in this case is supported by the existence of several aggravating circumstances completely supported by uncontroverted evidence. Third, the factual circumstances of the murders in our present case are quite different from those in *Godfrey*, as we have discussed earlier. Fourth, this court does, as we hereafter set forth, review and independently confirm the panel's findings. None of the factors leading to reversal in *Godfrey* exist in this case.

State v. Moore, Appendix 50a-51a. (Emphasis added)

Therefore, the relevant standards by which to judge the Nebraska Supreme Court's interpretation and application of the "exceptional depravity" element of aggravating circumstance (1)(d) to Moore's case must come from cases evaluating these questions in the context of judicial sentencing such as *Proffitt*, *Walton* and *Lewis*, as opposed

to jury sentencing cases such as *Godfrey* and *Maynard* relied upon by the Circuit Court.

Subjective v. Objective Standards

The Nebraska Supreme Court's definition of the "exceptional depravity" element of aggravating circumstance (1)(d) as "so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life" was found by the Circuit Court to violate the Eighth and Fourteenth Amendments for the following reason: "[T]he phrase in its entirety calls for subjective consideration." *Moore v. Clarke*, 904 F.2d at 1230.

The appropriate function of an aggravating circumstance is to guide or channel the discretion of the sentencing entity. We are unaware of any authority to support the proposition apparently forwarded here by the Circuit Court that an appropriately defined aggravating circumstance cannot be based upon the sentencing entity's determination of subjective factors such as the killer's state of mind or motivation which are often not capable of objective proof, or that the use of commonly understood modifiers which do not describe a single specific *act* but describe a specific *type of behavior or conduct* are not constitutionally acceptable under *Proffitt* and *Walton*. As the dissent below noted:

> The [Circuit] court's attempt to label various aspects of Nebraska's scheme as "objective" or "subjective" based on the presence of certain adverbs and adjectives, *see Moore*, 904 F.2d at 1230, has resulted in unnecessary semantic endeavors; after all, the standards approved in

> *Walton* contain adverbs, adjectives, and other words of subjective meaning.

Appenix 107a. (Gibson, dissenting)

The Arizona aggravating circumstance challenged in *Walton* contained the words "especially depraved". In approving the definition of that term applied to it by the Arizona courts, this Court stated:

> Nor can we fault the state court's statement that a crime is committed in an especially "depraved" manner when the perpetrator . . . "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killings.

Id., 111 L.Ed.2d at 528. As noted above, the Nebraska courts had also narrowed their definition of the "depraved" aspect of its aggravating circumstance. *State v. Moore*, 210 Neb. 457, 470-471, 316 N.W.2d 33 (1982), *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977).

While there is no indication on this record that Moore took any particular pleasure in his homicides, neither is there any indication that the taking of pleasure in the killing of another human being is the only constitutionally acceptable definition of the term "especially depraved". The definitional narrowing of otherwise overbroad statutory aggravating circumstances is a matter of state law and one state's definition of, for example, "depravity" need not limit other constitutionally acceptable definitions of that term by other states. See *Maynard v. Cartwright*, 486 U.S. 356, 365 (1988).

The definition adopted by the Nebraska courts defines a killer who moves unemotionally toward his homicidal goal totally devoid of a reluctance to kill based upon respect for the human life about to be taken. Here Moore planned killings of faceless, nameless individuals. These were killings which were conceived of, planned and driven, not by haste, anger or frustration, but purely by the killer's self centered sense of utility. These killings clearly represent a type of "depraved" behavior – cold, calculated behavior – totally and senselessly bereft of any regard for human life. There should be little doubt, as the courts of Nebraska have already noted, that the second element of Nebraska's aggravating circumstance (1)(d) adequately and constitutionally describes "exceptional depravity", Carey Dean Moore and the crimes for which he stands convicted.

The statutory language here in question and its judicial interpretation is a far cry from the "wholly arbitrary" system of determining sentences found inappropriate in *Furman*. The decision of the sentencing panel was guided by prior judicial interpretation of the broader statutory language and its written findings (see Appendix 65a) not only support its conclusions but are subject to objective review of the mental process and logic undertaken in reaching its decision, a luxury not available in any jury's verdict. We fail to see, as did the dissenting member of the Circuit Court panel below, that the statutory language here in question is more likely to cause the arbitrary and capricious imposition of a penalty of death than the definitions of aggravating circumstances approved by this court in *Proffitt*, *Walton* and *Lewis*.

II.

EFFECT OF SUBSEQUENT RULINGS OF THE NEBRASKA SUPREME COURT

Since Moore's sentencing the Nebraska Supreme Court has further refined, but not in any respect altered, its definition of the "exceptional depravity" element of aggravating circumstance (1)(d).

In *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *cert. den.* 484 U.S. 872 (1987) the court held:

> [W]e hold that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.

Id. 224 Neb. at 320, 399 N.E.2d 731-732. In so ruling the court further noted:

> [W]e observed that one or more of those five factors or circumstances, listed above, were present in those cases where "exceptional depravity" was found to exist as an aggravating circumstance in the illustrative Nebraska cases involving "exceptional depravity," which we have previously mentioned in this opinion [including *Moore*].

Id.

The Circuit Court concluded:

> The standard applied to Moore in 1980 was modified substantially six years later by *Palmer*,

> and the changes found desirable by the Nebraska Supreme Court in *Palmer* then demonstrate that the standards applied to Moore were vague.

Appendix 104a. The Circuit Court offers neither authority nor factual basis for this conclusion.

Simply because the Nebraska Supreme Court has further attempted to flesh out its definition of the statutory term "exceptionally depravity" does not, on its face or in fact, indicate that the definition available at the time of Moore's sentencing was constitutionally flawed. See section I. The Nebraska Supreme Court made it clear that the *Palmer* definition was in no respect a deviation from previous rulings or definitions offered by the court with respect to the aggravating circumstance at issue here.

CONCLUSION

For each of the reasons noted above we pray that the writ prayed for be issued. We believe the capital murder sentencing scheme of the State of Nebraska meets the requirements of this court's rulings with regard to the guiding of the sentencing entity's determination of which individuals convicted of first degree murder deserve the sentence of death. What the State of Nebraska apparently has not met are the desires of the Circuit Court for a capital sentencing scheme that can be applied with the "mathematical precision" this court has recognized, in

Walton, is neither humanly attainable nor constitutionally necessary.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1991

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v.

CAREY DEAN MOORE,

Respondent.

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2584

Carey Dean Moore, *
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Appellee, *
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v. *
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Harold W. Clarke, *
*
Appellant. *

No. 88-2679

Carey Dean Moore, *
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Appellant, *
*
v. *
*
Harold W. Clarke, *
*
Appellee. *

Appeals from the United States District Court for the District of Nebraska.

Submitted: June 16, 1989

Filed: May 25, 1990

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The Warden of the Nebraska State Penitentiary appeals from the district court's[1] order granting a writ of habeas corpus to Carey Dean Moore. Moore was convicted on two counts of first-degree murder and sentenced to death on each count after the sentencing panel applied the Nebraska statute dealing with aggravating and mitigating circumstances, Neb. Rev. Stat. § 29-2523 (Reissue 1985). Nebraska statute permits the sentencing panel to consider, in determining if the death penalty should be applied, whether the murder "manifested exceptional depravity by ordinary standards of morality and intelligence." *Id.* § 29-2523(1)(d). The district court, adopting the Report and Recommendation of the United States Magistrate,[2] held that this statutory provision was unconstitutionally vague as written and as construed by the Nebraska Supreme Court. While this is a difficult issue requiring careful consideration, we are satisfied that the district judge correctly analyzed the constitutionality of this statutory aggravating circumstance and, therefore, we affirm the order granting the writ of habeas corpus.

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[1] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

[2] The Honorable David L. Piester, United States Magistrate for the District of Nebraska.

Carey Dean Moore was charged with two counts of first-degree murder stemming from the deaths of two cab drivers in August 1979. Both murders were committed in the perpetration, or the attempted perpetration, of a robbery. Moore waived his right to a trial by jury and was found guilty on both counts by the state trial court. A panel of three judges, including the trial judge, held a sentencing hearing and, pursuant to section 29-2523,[3]

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[3] This statute provides:

The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(Continued on following page)

determined that the following aggravating circumstances existed: (1) Moore had a "substantial history of serious

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(Continued from previous page)

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements

(Continued on following page)

assaultive or terrorizing criminal activity" in regard to the second murder because it followed only four days after the first murder; (2) Moore committed both murders "in an apparent effort . . . to conceal the identity of the perpetrator;" and (3) the murders "manifested exceptional depravity by ordinary standards of morality and intelligence." *See* Neb. Rev. Stat. § 29-2523(1)(a), (b), and (d).

The sentencing panel then discussed each of the statutory mitigating circumstances recognized by section 29-2523(2) and found none to exist in Moore's case. The panel also considered whether nonstatutory mitigating circumstances existed and specifically focused on Moore's family background. The panel acknowledged that Moore's childhood had been disadvantaged and that his family background was entitled to consideration as a mitigating factor; the panel nevertheless decided that this mitigating factor did not outweigh the aggravating circumstances found to exist beyond a reasonable doubt in Moore's case.

The sentencing panel then analyzed "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases," as required by section 29-2522(3). The panel found that sentencing Moore to death was neither excessive, nor disproportionate, to the

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(Continued from previous page)

of law was impaired as a result of mental illness, mental defect, or intoxication.

Neb. Rev. Stat. § 29-2523.

sentences imposed in similar cases, and therefore sentenced him to death on both counts of murder.

The convictions and sentence were affirmed by the Supreme Court of Nebraska. *State v. Moore,* 210 Neb. 457, 316 N.W.2d 33 (1982). The United States Supreme Court denied certiorari in *Moore v. Nebraska,* 456 U.S. 984 (1982). The state trial court denied Moore's motion to vacate his conviction filed pursuant to the Nebraska Postconviction Proceedings Act, Neb. Rev. Stat. §§ 293001 to -3004 (Reissue 1985). The denial was affirmed by the Supreme Court of Nebraska, *State v. Moore,* 217 Neb. 609, 350 N.W.2d 14 (1984), which also denied Moore's request for a rehearing.

Moore then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 (1982). The United States Magistrate recommended that Moore's petition for a writ of habeas corpus be granted with respect to his claim that the "exceptional depravity" language of section 29-2523 was unconstitutionally vague. The magistrate denied Moore's remaining claims, and recommended that Moore be resentenced to life imprisonment unless the State initiated capital resentencing proceedings within a reasonable time after judgment became final. Since the Nebraska death penalty statute requires that aggravating and mitigating circumstances be weighed against each other, Neb. Rev. Stat. § 29-2522, and the Nebraska Supreme Court does not apply a harmless error analysis in cases where an aggravating circumstance is found to have been

invalidly applied,[4] Moore's sentence would have to be vacated for new sentencing proceedings.

The district court adopted the analysis and conclusions of the magistrate. It held that the "exceptional depravity" language was unconstitutionally vague but denied all other claims. Accordingly, the court granted the writ of habeas corpus. This appeal followed.

I.

The sole issue raised by the State in this appeal is whether the phrase "manifested exceptional depravity by ordinary standards of morality and intelligence," contained in section 29-2523(1)(d), is unconstitutionally vague as written and construed by the Supreme Court of Nebraska. In the seminal case on this issue, *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the Supreme Court held that standardless discretion vested in a sentencing body considering the death penalty violated the Eighth and Fourteenth Amendments of the Constitution. *Id.* at 239-40. "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). It "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather

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[4] *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982).

than caprice or emotion." *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

A.

The Supreme Court of Nebraska, in affirming Moore's death penalty, discussed in detail the statutory provision being challenged here, which reads:

> The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence. . . .

Neb. Rev. Stat. § 29-2523(1)(d). The court stated that this aggravating circumstance "describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another." *Moore*, 210 Neb. at 470, 316 N.W.2d at 41. The court agreed with the sentencing panel that the first circumstance, that the murder was especially heinous, atrocious, or cruel, did not exist in this case. *Id.* The court then discussed the second circumstance as follows:

> The second circumstance pertains to the state of mind of the actor. In *State v. Stewart*, [197 Neb. 497, 250 N.W.2d 849 (1977)], we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" . . . and in *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life". . . . The sentencing panel found the second circumstance did apply. We agree that

> the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft of regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life.

Id. at 470-71, 316 N.W.2d at 41. Thus, the sentencing panel based Moore's death penalty, in part, upon a finding of "exceptional depravity," referring to the defendant's state of mind, and this was affirmed by the Nebraska Supreme Court.

Moore argues that the "exceptional depravity" language is unconstitutionally vague in violation of the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the states through the due process clause of the Fourteenth Amendment. The district court found this language to be facially unconstitutional[5] because it offered nothing objective as

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[5] The district court had concluded earlier that this statute was unconstitutional, *see Holtan v. Black*, CV84-L-393, unpublished memorandum of decision (D. Neb. Nov. 5, 1986), *vacated on other grounds*, 838 F.2d 984 (8th Cir. 1988), and repeated its conclusion in the *Moore* decision.

an "inherent restraint on the arbitrary and capricious infliction of the death sentence," *Godfrey*, 446 U.S. at 428, and was not "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg*, 428 U.S. at 189.

We agree with the district court's conclusion that the text of the statute, standing alone, is not constitutionally sufficient. Our examination, however, must extend beyond this conclusion because a state supreme court may salvage a facially-vague statute by construing it to provide the sentencing body with objective criteria for applying the statute. *See Godfrey*, 446 U.S. at 423; *Gregg*, 428 U.S. at 201. Thus, our task here is to determine whether the Supreme Court of Nebraska has construed the "exceptional depravity" language in a manner which directs and limits the discretion of the sentencing body "so as to minimize the risk of wholly arbitrary and capricious action," *id.* at 189, and provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," *id.* at 188 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

The Nebraska Supreme Court construed the challenged language in several opinions before the sentencing panel sentenced Moore to death in 1980. The district court identified three phrases which may be gleaned from these opinions evidencing the Nebraska Supreme Court's attempt to limit the application of the vague phrase to within constitutional confines. In these various cases, the Nebraska Supreme Court has held that "exceptional depravity" means:

(1) "so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life," *State v. Harper*, 208 Neb. 568, 579, 304 N.W.2d 663, 668 (1981), *cert. denied*, 454 U.S. 882 (1981); *State v. Rust*, 197 Neb. 528, 539, 250 N.W.2d 867, 874 (1977), *cert. denied*, 434 U.S. 912 (1977); *accord State v. Holtan*, 197 Neb. 544, 547, 250 N.W.2d 876, 880 (1977), *cert. denied sub nom.* 434 U.S. 912 (1977); *State v. Stewart*, 197 Neb. 497, 522-23, 250 N.W.2d 849, 864 (1977);

(2) "unresisting victims," *Holtan*, 197 Neb. at 547, 250 N.W.2d at 880; *accord State v. Peery*, 199 Neb. 656, 675, 261 N.W.2d 95, 104-05 (1977), *cert. denied*, 439 U.S. 882 (1978); and

(3) "exceptional," *State v. Simants*, 197 Neb. 549, 566, 250 N.W.2d 881, 891 (1977), *cert. denied*, 434 U.S. 878 (1977).

These three phrases were the sole guidance provided by the Supreme Court of Nebraska to the sentencing panel in its task of determining whether the murders committed by Moore "manifested exceptional depravity by ordinary, standards of morality and intelligence." In its sentencing order, the panel actually employed only the "so coldly calculated" language in discussing the circumstances found to be aggravating.

Following Moore's sentencing, the Supreme Court of Nebraska further discussed the challenged language in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *cert. denied*, 484 U.S. 872 (1987). In *Palmer*, the court adopted a five-factor test to determine whether "exceptional depravity" existed, stating:

> Therefore, for the purpose of [applying] § 29-2523(1)(d) as an aggravating circumstance

> in determining whether the death penalty may be imposed, we hold that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.

224 Neb. at 320, 399 N.W.2d at 731-32.

B.

Upon closer examination of this judicial precedent, we conclude that the district court did not err in holding that the Supreme Court of Nebraska has failed to provide the guidance necessary to sentencing bodies to cure the constitutional deficiencies of this vaguely-worded statute.

As the district court noted, the phrase "so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life" offers little, if any, objective guidance. We agree with the district court's statement that, although "cold planning" has an "aura of objectivity" about it, when it is considered in combination with the "absence of regard for human life" language, the phrase in its entirety calls for subjective consideration.

The phrase "exceptional," which modifies "depravity" in the challenged statute, is equally unhelpful to a sentencing body seeking objective standards to guide its discretion. "Exceptional" carries vagueness and subjectivity to the same extent as "especially," a standard

rejected by the Supreme Court when examining an Oklahoma aggravating circumstances statute similar to the one in issue here. In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Court declared that the language "especially heinous, atrocious, or cruel" gave insufficient guidance to the sentencing body and focused on the deficiencies of the adjective "especially":

> The State's contention that the addition of the word "especially" somehow guides the [sentencing body's] discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the [sentencing body] should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."

Id. at 364.

Similarly, the phrase "unresisting victims" is of little value. We agree with the district court's conclusion that, while this phrase initially may have provided some objective guidance, it nevertheless cannot be relied upon to limit the discretion of the sentencing body after *Palmer's* five-factor analysis redefined this phrase as "helplessness of the victim." "Unresisting" and "helpless" cannot be equated in the context of murder because "helpless" encompasses a much broader, and potentially a circular, meaning here: All murder victims could be characterized as "helpless," as evidenced by the fact that they were murdered.

The State relies heavily on the *Palmer* court's articulation of five factors which, according to the State, will support a finding of "exceptional depravity" if found to exist individually or collectively. The *Palmer* decision is particularly troubling to us, as it was to the district court. *Palmer* was decided more than six years after Moore was sentenced. Obviously, whatever guidance the *Palmer* decision has provided to sentencing bodies was of no value to the panel sentencing Moore in 1980. The State characterizes *Palmer* as merely "clarifying" existing law; however, we are not persuaded by this argument. First, if the only function of *Palmer's* five-factor analysis was to clarify existing law, we do not see how it should be applied retroactively since the central issue here is the clarity of the law at the time when Moore was sentenced. The sentencing panel did not have the benefit of *Palmer's* "clarification"; therefore, the State should not be permitted to rely on it now. Furthermore, we believe that the State's reliance on *Palmer* is misplaced because, as will be discussed, that case cannot be accurately characterized as simply clarifying existing law. Having noted our concerns with the State's reliance on *Palmer*, we nevertheless choose to include it in our analysis because it provides insight into the Nebraska Supreme Court's efforts to make the challenged language constitutionally acceptable.

C.

Palmer provided an exhaustive summary of death penalty cases characterized as illustrative of "exceptional

depravity," including Moore's case and the cases previously discussed here in the context of the precedent available to guide the panel sentencing Moore. 224 Neb. at 315-18, 399 N.W.2d at 729-31. The court then declared that the establishment of one or more of five specified factors would support a finding of "exceptional depravity," and further observed that at least one of the factors was present in each case it offered as illustrations of "exceptional depravity," including Moore's case. *Id.* at 320, 399 N.W.2d at 731-32.

Assuming arguendo that *Palmer* had been available to guide the panel sentencing Moore, we still are not convinced that the *Palmer* decision, when considered with the earlier cited cases, fulfills the constitutional obligation of the Nebraska Supreme Court. "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428.

The Nebraska Supreme Court's attempt in *Palmer* to rearticulate its interpretation of the vague "exceptional depravity" language fails because it cannot be reconciled with the prior Nebraska cases. The district court also reached this conclusion and, after comparing *Palmer* with the earlier attempts to constitutionally define the aggravating circumstance in issue, stated that:

> The 1986 definition [in *Palmer*] of the second prong of aggravating factor (d) looks nothing like the pre-1986 illustrations.
>
> . . . .

> If the 1986 definition intended to abandon its pre-1986 efforts at guidance, it did not say so distinctly. If it did not so intend, a sentencer now has a series of suggestions, some objective and some not, from which to choose, without assurance that the series is complete.
>
> . . . .
>
> In short, as earnest as the Supreme Court of Nebraska has been in its difficult task to bring Nebraska's statutory language of this aggravating factor into [constitutional] objectivity, a sentencer is left with only scattered and uncertain fragments for a definition.

Palmer's conclusory statement that the illustrative cases each exhibited one or more of the five factors is unilluminating. While these cases may indeed have in common the fact that the circumstances of the murder lead one to subjectively conclude that the murders manifested "exceptional depravity," that subjective conclusion alone is insufficient to bring the vague language within constitutional confines. The court did not explain why one or more of the five factors existed in the illustrative cases nor do the cases themselves explicitly refer to any of the factors set forth in *Palmer*. In order for a state to impose the death penalty, the Constitution requires more than a subjective recognition that the case being considered is similar to other murders in which other defendants were sentenced to death. The Supreme Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant

the imposition of the death penalty." *Maynard*, 486 U.S. at 363.

The *Palmer* court's attempt to articulate a workable, objective analysis is further flawed because some of the listed factors are necessarily subjective in nature and provide little, if any, restraint on the sentencing body's discretion. As was discussed previously, "helplessness" is too broad to be useful. Furthermore, as the district court observed, "senselessness of the crime" has no objective meaning. If senselessness of the crime were sufficient to permit a death penalty, virtually all murderers would be on death row. To us, the greater significance of *Palmer* is that it demonstrates the Nebraska Supreme Court's exhaustive efforts to redefine the phrase "exceptional depravity"; this simply underscores our conclusion that the phrase is unconstitutionally vague.

Our examination of the state court precedent available to guide sentencing bodies in Nebraska which are required to determine whether the murder "manifested exceptional depravity" leads us to conclude, as did the district court, that, as earnestly as the Nebraska Supreme Court has attempted to provide objective criteria,[6] the

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[6] Nebraska is not the only state to struggle with this issue. In *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983) (en banc), *cert. denied*, 461 U.S. 971 (1983), the Arizona Supreme Court developed a five-factor test, the same test later adopted by the Nebraska Supreme Court in *Palmer*, to provide a limiting construction of the language "especially heinous, cruel, or depraved." *Id.* at 52, 659 P.2d at 11. This attempt was rejected by the Ninth Circuit. "*Gretzler*'s attempt to limit the broad scope of heinous and depraved has thus proven unsuccessful

(Continued on following page)

unconstitutional vagueness of the critical language in this statute remains. A sentencing body may glean only subjective and unilluminating fragments from existing case law.[7]

D.

Furthermore, the Nebraska Supreme Court's review of this case, wherein the court extensively discussed the circumstances of Moore's crime and concluded that the murder "manifested exceptional depravity," does not overcome the constitutional deficiencies of the statute. This approach of reviewing the totality of circumstances surrounding the murder was rejected by the Supreme Court in *Maynard v. Cartwright*. The Tenth Circuit, in the *Maynard* opinion affirmed by the Supreme Court, held that "[c]onsideration of all the circumstances is permissible; reliance upon all of the circumstances is not." 822

(Continued from previous page)

at preventing the unchanneled imposition of death sentences." *Adamson v. Ricketts*, 865 F.2d 1011, 1035 (9th Cir. 1988) (en banc), *petition for cert. filed* (U.S. Mar. 20, 1989) (No. 88-1553).

[7] The dissent argues that a sentencing body is not entirely precluded from considering subjective factors in its decision to impose the death penalty. We believe that this is an issue which we need not explore. Our inquiry is whether the state has acted to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (footnotes omitted). The constitutional safeguard of guided discretion is required because "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

F.2d 1477, 1491 (10th Cir. 1987) (en banc). "The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*. No objective standards limit that discretion." *Id.* Accordingly, the Nebraska Supreme Court's opinion affirming Moore's death sentence does not provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey*, 446 U.S. at 433.

In conclusion, we believe that the body of law developed by the Nebraska Supreme Court construing the challenged statute provides insufficient guidance to a sentencing body called upon to determine whether a particular murder "manifested exceptional depravity." The Nebraska Supreme Court is constitutionally required to "minimize the risk of wholly arbitrary and capricious action," *Gregg*, 428 U.S. at 189, by providing more objectivity and specificity in the criteria utilized to determine whether this aggravating circumstance applies.

We therefore affirm the judgment of the district court that section 29-2523(1)(d) is unconstitutionally vague as written and as construed.

II.

Moore raises various arguments on cross-appeal. Among them, he argues that the district court erred by: (1) failing to hold that his sentence was unconstitutional

because he did not have a jury trial on whether aggravating circumstances existed; (2) failing to find the aggravating circumstance in section 29-2523(1)(a) unconstitutionally vague; (3) failing to hold that his sentence was unconstitutional because the sentencing panel failed to consider all mitigating evidence; (4) failing to find that Moore was denied due process at his sentencing hearing; and (5) rejecting some of Moore's claims on the merits and finding waiver of others without the requested evidentiary hearings. Moore also contends that Nebraska's death penalty statutes as a whole lead to arbitrary results.

A.

We deal summarily with the issue of Moore's right to have a jury trial on whether aggravating circumstances existed. The United States Supreme Court has expressly declared that a criminal defendant has "no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986). Furthermore, our recent opinion in *Harper v. Grammer*, No. 87-2708 slip op. at 19-20 (8th Cir. Feb. 5, 1990), expressly rejected the argument that a criminal defendant has a Sixth Amendment right to have a jury determine the existence of aggravating circumstances.

B.

Moore argues that the following aggravating circumstance, found to be applicable to him, is unconstitutionally vague:

> The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity . . . .

Neb. Rev. Stat. § 29-2523(1)(a). The sentencing panel determined that the first clause did not apply because Moore had not previously been convicted of another murder or violent crime; however, it found that the evidence established the existence of the second clause in Moore's case. In other words, Moore had a "substantial history of serious assaultive or terrorizing criminal activity." This was based on the fact that Moore had committed the first murder four days before the second murder.

The Magistrate's Report and Recommendation rejected Moore's challenge to the constitutionality of this statutory provision; the district court adopted this conclusion. On appeal, we also adopt the magistrate's careful analysis of this issue, *see United States v. Rodriguez*, 888 F.2d 519, 521-22 (7th Cir. 1989); therefore, we also conclude that this aggravating circumstance passes constitutional muster. The Nebraska Supreme Court has provided sufficient guidance to sentencing bodies, concerning this particular aggravating circumstance, to prevent the arbitrary and capricious infliction of the death penalty, and has specifically held that an earlier murder supports a finding that a defendant has a "substantial history of serious assaultive or terrorizing criminal activity." *See State v. Joubert*, 224 Neb. 411, 412-13, 426, 399 N.W.2d 237, 241, 248 (1986) (per curiam) (holding that defendant who committed a murder two and one-half months prior to the murder for which he was being sentenced had a

substantial history of serious assaultive or terrorizing criminal activity), *cert. denied*, 484 U.S. 905 (1987); *see also State v. Rust*, 197 Neb. at 535, 250 N.W.2d at 872-73 (holding that the clause refers to events and incidents prior to and not part of the events out of which the current charge arises); *State v. Holtan*, 197 Neb. at 546, 250 N.W.2d at 879 (discussing the meaning of the challenged statutory language).

We note, however, that our holding is limited to Moore's constitutional vagueness argument. Further proceedings in this case may present new issues with respect to this aggravating circumstance, and Moore is not foreclosed from raising such issues in the future.

C.

The other issues raised by Moore on cross-appeal are directed at perceived inadequacies in the procedures used in sentencing him. We believe that these issues are more appropriately resolved by the state court at the time that Moore is resentenced.

D.

Finally, we note that the Supreme Court has recently handed down a decision concerning the constitutionality of a state appellate court reweighing the mitigating and aggravating circumstances after an aggravating circumstance has been held to be invalid. *Clemons v. Mississippi*, 58 U.S.L.W. 4395 (U.S. Mar. 28, 1990). After our mandate issues, the district court and the Nebraska state courts may consider whether this opinion has implications for

any further proceedings which may be contemplated in this case.

III.

In conclusion, we affirm the district court's order granting a writ of habeas corpus to Moore based on the unconstitutional vagueness of the "exceptional depravity" provision of the statute dealing with aggravating and mitigating circumstances, Neb. Rev. Stat. § 29-2523(1)(d).

FLOYD R. GIBSON, Senior Circuit Judge, dissenting.

I respectfully dissent. I believe that the Nebraska Supreme Court has provided an interpretation of section 29-2523(1)(d) that brings its language into constitutional confines. The statute provides that the death sentence may be imposed on a defendant where "[t]he murder . . . manifested exceptional depravity by ordinary standards of morality and intelligence . . . . " Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985). As the majority points out, prior to Moore's sentencing the Nebraska Supreme Court had stated on several occasions that "exceptional depravity" in this context means "so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life." *State v. Rust*, 197 Neb. 528, ___, 250 N.W.2d 867, 874, *cert. denied*, 434 U.S. 912 (1977); *State v. Stewart*, 197 Neb. 497, ___, 250 N.W.2d 849, 864 (1977); *State v. Holtan*, 197 Neb. 544, ___, 250 N.W.2d 876, 880, *cert. denied*, 434 U.S. 912 (1977). Further, the Nebraska Supreme Court had recognized that " 'all first degree murder crimes are capable of being accurately characterized by one or more of the descriptive adjectives employed, but by the use of the words 'especially' and

'exceptional' the legislature has required a much greater degree of these characteristics than is usually present in a murder.' " *Rust*, 197 Neb. at ___, 250 N.W.2d at 874. In *State v. Holtan*, the Nebraska Supreme Court had held that the second prong of section 29-2523(1)(d) applied even though the murder did not involve torture because "[t]he defendant killed, and attempted to kill, unresisting victims of the robbery." 197 Neb. at ___, 250 N.W.2d at 880. And, in *State v. Simants*, Nebraska's high court had stated that the key word in the second prong of the section is "exceptional." It acknowledged that "[i]t might be argued that every murder involves depravity. The use of the word "exceptional," however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence". 197 Neb. 549, ___, 250 N.W.2d 881, 891, *cert. denied*, 434 U.S. 878 (1977).

I believe that in these cases the Supreme Court of Nebraska has provided sufficient guidance to sentencing bodies that prevents the arbitrary imposition of the death penalty.

The majority concedes that the phrase "so coldly calculated" has an "aura of objectivity" and that the phrase "unresisting victims" initially provided some objective guidance, but ultimately concludes that Nebraska's definition taken as a whole calls for subjective consideration and is thus impermissible. I disagree. I do not claim that the second prong of section 29-2523(1)(d) as written and construed does not call upon the sentencing body to engage in any subjective consideration. I can see that it does call for the assessment of certain subjective factors. Any aggravating circumstance statute that

attempts to describe only a state of mind, as section 29-2523(1)(d) does, will necessarily involve some degree of subjectivity. But I do not believe that this statute must be declared unconstitutionally vague for that reason.

The United States Supreme Court has not required the states that choose to impose capital punishment to entirely preclude the sentencing body's consideration of subjective factors. In *Gregg v. Georgia*, the Court warned that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). That language does not suggest a rule that aggravating circumstances statutes must be based on entirely objective factors; rather, it forbids the "risk" of action that is "wholly arbitrary and capricious." Similarly, in *Proffitt v. Florida*, the Supreme Court stated that "the requirements of *Furman* [v. Georgia, 408 U.S. 238 (1972)] are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, *thus eliminating total arbitrariness and capriciousness in its imposition*." 428 U.S. 242, 258 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added). Even though section 29-2523 (1)(d) to some extent calls for a subjective judgment I believe that by its construction the Nebraska Supreme Court had, at the time of Moore's sentencing, provided contours to the statute that saved it from unconstitutional vagueness as that principle has been defined by the United States Supreme Court.

It seems to me that the majority's approach in this case could defeat virtually any aggravating circumstance statute, and by the use of semantics make a dead letter of any death statute. For example, the majority relies on the oft-repeated argument that words such as "senseless" and "depraved" offer no guidance because they are too subjective and are terms that could accurately be used to describe any murder. The statutory aggravating circumstance upheld in *Proffitt*, construed as " 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim' ", *see Proffitt*, 428 U.S. at 255 (quoting *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974)) is arguably objectionable for the same reasons: all first degree murders are in a sense conscienceless and pitiless, and "unnecessarily torturous" calls upon the sentencing body to somehow distinguish between torture that is unnecessary and torture that is something else. In that definition, the word "torturous" does offer objective guidance, but the terms "pitiless" and "conscienceless" certainly leave some subjective consideration to the sentencing body. Despite that, the United States Supreme Court upheld that construction against a vagueness challenge, and in my view implied that the states' obligation in this regard is not to remove all subjective factors, but, rather, to provide sufficient limits and guidance so that capital punishment is not imposed in a wholly arbitrary manner.

I believe that Nebraska has met that obligation. It authorizes the death penalty where a murder manifests a depravity that offends all standards of morality and intelligence, such as where the murderer engaged in cold calculation showing a complete lack of regard for human

life or took the life of an unresisting victim. I am satisfied that that definition provides enough guidance to minimize the risk of wholly arbitrary and capricious action. The phrases "cold calculation" and "depravity offending all standards of morality and intelligence" and "unresisting victim" are sufficiently clear and specific and provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg*, 428 U.S. at 188 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

I am further satisfied that the Nebraska Supreme Court permissibly applied section 29-2523 (1)(d) in this case. The defendant unquestionably engaged in cold calculation as he chose his victims on the basis of his depraved belief that the life of an older person is less valuable than that of a young person, that for lucre, the preferred procedure for the murderer is to take the life of an unresisting victim in order to prevent identification of the murderer by his victim. The murderer's conduct here is by any standards indicative of conduct exceptionally depraved by "ordinary standards of morality and intelligence" and even by less than ordinary standards.

I would hold that the second prong of section 29-2523 (1)(d) as construed by the Nebraska Supreme Court is not unconstitutionally vague and was permissibly applied in this case, and would thus reverse the district court's decision to grant the writ of habeas corpus.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CAREY DEAN MOORE, Petitioner,	)	CV84-L-754
vs.	)	MEMORANDUM OF DECISION ON PETITION FOR WRIT OF HABEAS CORPUS
HAROLD W. CLARKE, Respondent.	)	(Filed Sep. 20, 1988)

The report and recommendation of Magistrate David L. Piester, filing 41, carefully reviews the claims of the petitioner and recommends denial of all claims, except that portion of the petitioner's tenth claim which challenges as unconstitutionally vague the application of aggravating circumstance (l)(d) of Neb. Rev. Stat. Section 29-2523. I agree with his analysis and conclusion and add only the following observations with respect to the application of that one aggravating circumstance.

Neb. Rev. Stat. Section 29-2523(1)(d) says that one aggravating circumstance that may be considered in determining whether the death penalty is to be applied is:

> "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

The Supreme Court of Nebraska in affirming the petitioner's death penalty said that this statutory provision:

> "describes in the disjunctive two separate circumstances which may operate in conjunction

with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the 'pitiless crime which is unnecessarily torturous to the victim' and to cases where torture, sadism, or the imposition of extreme suffering exists. . . . In this case the sentencing panel found that aggravating circumstance did not exist. We agree. The second circumstance pertains to the state of mind of the actor. In *State v. Stewart*, [197 Neb. 497, 250 N.W.2d 849 (1977)], we said the second instance indicates a situation 'where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence' . . . and in *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind 'totally and senselessly bereft of any regard for human life'. . . . The sentencing panel found the second circumstance did apply. We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft of regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life."

State v. Moore, 210 Neb. 457, 470-471, 316 N.W. 2d 33 (1982).

Thus, it is the second prong, the one dealing with the state of mind of the defendant, that was utilized by the sentencing panel in imposing the death penalty.

In *Holtan v. Black*, CV84-L-393, unpublished memorandum of decision dated November 5, 1986, I said:

> " . . . The problem comes in the second prong of the Nebraska Supreme Court's construction. . . .
>
> The words used by the Supreme Court of Nebraska in the second prong relate to the set of the offender's mind. They offer nothing objective, such as torture or other physical abuse, as guidance to a sentencing panel by way of an 'inherent restraint on the arbitrary and capricious infliction of the death sentence.' *Godfrey v. Georgia*, 446 U.S. at 428. The words of the second prong are not 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' *Gregg v. Georgia*, 428 U.S. at 189. They do not provide the sentencer with 'clear and objective standards' for 'specific and detailed guidance' that may 'make rationally reviewable the process for imposing a sentence of death.' *Godfrey v. Georgia*, 446 U.S. at 427-28. 'Totally and senselessly bereft of any regard for human life' is no more meaningful to a sentencing panel than 'especially heinous, atrocious, cruel or manifested exceptional depravity . . . ' "

It is apparent that under *Gregg v. Georgia*, 428 U.S. 153 (1976), a state supreme court's construction of an ambiguously worded statute may relieve the statute of its unconstitutionality, if the language of that statute is limited by the construction in such a way that the sentencer is given objectively recognizable criteria for applying the statute. The question, then, is whether the Supreme Court of

Nebraska has so construed the second prong of the Nebraska's statute.

Four decisions of the Supreme Court of Nebraska before its decision in the petitioner's case used words other than the words of the statute to describe the second prong of aggravating circumstance (d). In *State v. Holtan*, 197 Neb. 544, 547, 250 N.W. 2d 876 (1977), the court said:

> " . . . The defendant killed, and attempted to kill, *unresisting victims* to the robbery. The act was totally and senselessly bereft of any regard for human life." (Emphasis added.)

In interpreting that language the court in *State v. Rust*, 197 Neb. 528, 539, 250 N.W.2d 867 (1977), said:

> "Today in *Holtan* we have also said that aggravating circumstance (d) exists where the murder is *so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life.*" (Emphasis added.)

In *State v. Harper*, 208 Neb. 568, 579, 304 N.W.2d 663 (1981), the court said:

> " . . . The sentencing court's finding that the murders of Duane Johnson and Chad Shelton were *so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life* appropriately summarizes the facts of this case." (Emphasis added.)

In *State v. Simants*, 197 Neb. 549, 566, 250 N.W.2d 881 (1977), the court said this about the second prong of aggravating factor (d):

> " . . . In interpreting this portion of the statute, the key word is 'exceptional.' It might be argued

> that every murder involves depravity. The use of the word 'exceptional,' however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. We find such depravity was present in the murder of the three females." (Emphasis added.)

Three phrases of the Supreme Court of Nebraska from these opinions may be pointed to as arguably limiting the words of the second prong of aggravating factor (d). They are: (1) "so coldly calculated as to indicate a state of mind totally and senselessly bereft of any regard for human life," (2) "unresisting victims," and (3) "exceptional." The sentencing panel had no other language to guide it as to what constitutes a murder that "manifested exceptional depravity by ordinary standards of morality and intelligence," as set out in the statute.

Of these three phrases only the "so coldly calculated" language was employed by the sentencing panel. Order of Sentencing, filing 39, p. 85.

"So coldly calculated as to indicate a state of mind totally and senselessly bereft of any regard for human life" offers little, if anything, objective in nature. Planning is a part of the standard, but not planning alone. "Cold" planning suggests a lack of emotion. That combination has an aura of objectivity about it. "So," however, ties the emotionless planning to an absence of "any regard for human life," which is altogether subjective. Most troubling is the Nebraska Supreme Court's later definitive analysis in *State v. Palmer*, 224 Neb. 282, 320, 399 N.W.2d 706 (1986) of the second prong of aggravating factor (d).

There it made no mention of emotionless planning tied to an absence of any regard for human life. It said instead:

> "Therefore, for the purpose of s 29-2523(1)(d) as an aggravating circumstance in determining whether the death penalty may be imposed, we hold that 'exceptional depravity' in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. . . . Consequently, where one or more of those five factors are present, there may be a finding of 'exceptional depravity' concerning a first degree murder."

The 1986 definition of the second prong of aggravating factor (d) looks nothing like the pre-1986 illustrations.

"Unresisting victims," used in *State v. Holtan, supra,* may be an objective factor, but the *Palmer* definition moves from "unresisting" to "helpless." The two are not the same. The sentencing panel in the petitioner's case did not find an unresisting victim in each of the two murders committed by the petitioner, and I gather from the file that it could not have so found with respect to the first murder. "Helplessness" is so general a term that it is fair to say that a reasonable person could conclude that any murder victim was helpless as evidenced by the fact of the murder. "Senselessness of the crime" has no objective meaning; if senselessness of a crime is sufficient to permit a death penalty, it can be granted in virtually any

case. The sentencing panel of the petitioner's case made no finding of "apparent relishing of the murder by the killer," or "infliction of gratuitous violence on the victim," or "needless mutilation of the victim."

If the 1986 definition intended to abandon its pre-1986 efforts at guidance, it did not say so distinctly. If it did not so intend, a sentencer now has a series of suggestions, some objective and some not, from which to choose, without assurance that the series is complete.

The adjective "exceptional," underscored in *Simants*, is much like "especially," which has been treated and rejected by the Supreme Court of the United States in *Maynard v. Cartwright*, ___ U.S. ___, 56 U.S.L.W. 4501, 4503, in dealing with a statute similar to Nebraska's first prong:

> " . . . To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.' "

In short, as earnest as the Supreme Court of Nebraska has been in its difficult task to bring Nebraska's statutory language of this aggravating factor into constitutional objectivity, a sentencer is left with only scattered and uncertain fragments for a definition.

The procedure of simply analyzing on appeal the specific facts of the case to determine that they fall within the ambit of the language of the second prong of the

aggravating circumstance (d) does not render the ambiguous words of the statute constitutional. The Supreme Court in *Maynard v. Cartwright, supra,* dealt with that practice. It said:

> "The Court of Appeals, with some care, reviewed the evolution in the interpretation of the 'especially heinous, atrocious, or cruel' aggravating circumstance by the Oklahoma Court of Criminal Appeals up to and including its decision in this case. Its reading of the cases was that while the Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, that court had 'refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance.' 822 F.2d, at 1491. Rather, the Oklahoma court simply had reviewed all of the circumstances of the murder and decided whether the facts made out the aggravating circumstance. *Ibid.* . . .
>
> The State, however, takes issue with the Court of Appeals' conclusion that this approach, which was also employed in this case, to interpreting and applying the challenged aggravating circumstance is unconstitutional. It insists that in some cases there are factual circumstances that so plainly characterize the killing as 'especially heinous, atrocious, or cruel' that affirmance of the death penalty is proper. As we understand the argument, it is that a statutory provision governing a criminal case is unconstitutionally vague only if there are no circumstances that could be said with reasonable certainty to fall within reach of the language at

issue. Or to put it another way, that if there are circumstances that any reasonable person would recognize as covered by the statute, it is not unconstitutionally vague even if the language would fail to give adequate notice that it covered other circumstances as well.

The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. *United States f. Powell*, 423 U.S. 87, 92-93 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *Palmer v. City of Euclid*, 402 U.S. 544 (1971) (*per curiam*); *United States v. National Dairy Corp.*, 372 U.S. 29, 32-33, 36 (1963). Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate court with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972)."

To date the dissimilar results in the cases before the Supreme Court of Nebraska, despite that court's attempt at specificity, leave the sentencer to look closely at the

facts of each case and to decide whether those facts show enough to lead to a finding that the second prong of aggravating factor (d) is applicable, without restriction beyond the boundless words of the statute. More specificity is required in order for that aggravating circumstance to have a constitutional validity, whether the sentencer is a single judge, a panel of judges, or either with the assistance of a jury.

It follows that, as to that single claim, the petitioner's petition for writ of habeas corpus must be granted.

Harold W. Clarke has become warden of the Nebraska State Penitentiary since this case was filed. Accordingly, he should be substituted as the respondent.

Dated September 20, 1988.

BY THE COURT

/s/ Karren K. Urbom
United States
District Judge

APPENDIX C

STATE OF NEBRASKA, APPELLEE, V.
CAREY DEAN MOORE, APPELLANT.

316 N.W.2d 33

Filed January 29, 1982. No. 43557.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

CLINTON, J.

The defendant, Carey Dean Moore, age 22, was charged with two counts of first degree murder as follows: (1) On August 22, 1979, having killed Reuel Eugene Van Ness, Jr., in the perpetration of or attempt to perpetrate a robbery, and (2) on August 27, 1979, having killed Maynard D. Helgeland in the perpetration of or attempt to perpetrate a robbery. After waiving a trial by jury, defendant was tried by the court and found guilty on both counts. Pursuant to the provisions of Neb. Rev. Stat. §§ 29-2520 et seq. (Reissue 1979), a sentencing hearing was held on May 22, 1980, before a panel of three judges, including the trial judge. On June 20, 1980, the defendant was, on each count, sentenced to the penalty of death by electrocution.

The case has come to this court for automatic review. The defendant assigns the following alleged errors: (1) The Nebraska statutes providing for capital punishment are unconstitutional because the death sentence is per se unconstitutional and prohibited by the eighth and fourteenth amendments to the U.S. Constitution and article I, § 9, of the Bill of Rights of the Nebraska Constitution. (2) Neb. Rev. Stat. §§ 29-2519 through 29-2523 (Reissue 1979), providing the conditions under which the death penalty may be imposed, are unconstitutional because they do not provide for a jury determination of the existence of the aggravating and mitigating circumstances described in the statutes and the appropriateness of the death penalty. (3) Sections 29-2523 et seq. are unconstitutionally vague and indefinite, and appellate interpretation has not removed this ambiguity. (4) The sentencing panel of judges did not properly apply to the evidence in the case the aggravating and mitigating circumstances as defined by statute and the interpretations of this court. (5) The panel erred in its review of homicide cases in which the death penalty was not imposed, claimed by the defendant to be similar to the case at bar, because the panel limited its review in accordance with our opinion in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). (6) The death penalty statute is unconstitutional because it limits the mitigating factors which can be considered by the sentencing tribunal. (7) A conviction and sentence in a capital case cannot be sustained unless it appears beyond a reasonable doubt that no error in the factfinding of the trial contributed in any way to the determination of guilt. (8) The statutes are unconstitutional because they do not require the State to prove beyond a reasonable doubt that

mitigating factors do not exist. (9) The provision of the statutes providing that the sentencing phase may be heard before either the judge who presided at the trial or before a sentencing panel of three judges, including the trial judge, is unconstitutional because it provides no guidelines for the determination of when the sentencing is to be done by a single judge and by a panel. (10) The sentence of death is excessive and should be reduced to life imprisonment.

We affirm the judgment and sentences.

The defendant did not introduce any evidence during the trial of the case. Therefore, there is no significant conflict on the issue of guilt. The defendant confessed commission of the two killings in taped interrogations by the police, which were introduced in evidence. It is not claimed that these confessions were involuntary.

An outline of the evidence, however, is necessary to a discussion of assignment (4) and in order that we may perform our independent function of determining whether the imposition of this particular death penalty is appropriate under the statutory standards, and to assure the death penalty is not imposed in an arbitrary and capricious manner.

Both of the victims were cabdrivers, and the modus operandi in each case was similar. About August 20, 1979, the defendant purchased the handgun with which the murders were committed. He acquired the gun by purchasing it from a cabdriver who had pawned the gun.

The defendant and the seller went together to the pawnshop where the gun was redeemed, the defendant furnishing the money for the redemption and paying the seller an additional $50. The gun was then test-fired.

We now quote from the findings made by the sentencing panel in its order, which findings are fully supported by uncontroverted evidence: "The defendant's own statements, in his confession to Officers O'Donnell and Thompson while in custody at Charles City, Iowa, indicate that these crimes had been in the planning stage for at least a day or two before the Van Ness homicide. Apparently on the evening prior to the Van Ness murder, the defendant had called a number of cabs from a telephone booth somewhere on Farnam Street in the downtown Omaha area to see how quickly each would respond to his call. The defendant then hid somewhere in the vicinity to await each cab's arrival, at which time he checked the cab to determine whether the driver would be a suitable victim, *i.e.*, not too young, since the defendant stated that it was easier for him to shoot an older man rather than a younger man nearer his own age. On the evening of the Van Ness homicide, the defendant's plan was to call one cab at a time from the Smoke Pit restaurant, and, if the driver who responded 'wasn't too old,' the defendant would just not identify himself as the fare for which the cab had been summoned. When Mr. Van Ness arrived at the Smoke Pit on August 22, 1979, the defendant determined that this was the driver who would be robbed and shot because 'he wasn't too young'.

"A similar pattern of events unfolded on August 26, 1979. The defendant went to the Greyhound Bus depot at 18th and Farnam Streets in Omaha that evening, and,

when he saw a lone cab with an older driver parked at the taxi stand outside the depot, he got into the cab and directed the driver to take him to the Benson area. According to the defendant, this particular cab and driver were selected both because there were no other cabs at the taxi stand at the time, thus decreasing the chances of the defendant's being identified, and because the driver was an older man. The defendant then stated that, as previously discussed, he had planned ahead of time to rob and shoot the driver of whichever cab he selected." In his confessions the defendant stated that he killed each of the victims in order that the victim would not be able to identify him as the robber.

The body of Van Ness was found at Dam Site 16 near Omaha on the morning of August 22, 1979. The body of Helgeland was found in his cab in Omaha about 7:30 a.m. on August 27, 1979. The defendant was positively identified as one of two persons getting into the Van Ness cab at the Smoke Pit restaurant in Omaha earlier that morning. The other person was identified as his younger brother. He was positively identified by fishermen as being in the cab at Dam Site 16 before the slaying, when Van Ness asked directions in order to take the defendant to the place at the dam where he wished to go. The gun, identified by expert witnesses as the one used in the two slayings, was found in the defendant's possession in a stolen automobile when the defendant was apprehended in Iowa on August 29, 1979.

The contention of the defendant that the death penalty is in all circumstances unconstitutional as constituting cruel and unusual punishment has been rejected by the U.S. Supreme Court and this court on a number of

occasions. We need not respond to that argument other than citing some of the pertinent precedents. *Gregg v. Georgia*, 428 U.S 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980); *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981).

The defendant cites no judicial precedent or constitutional provision supporting a proposition that the U.S. and the Nebraska Constitutions require that, in order that the death penalty may be constitutionally imposed, a jury make the factual determinations pertaining to aggravating and mitigating circumstances. We have expressly rejected that contention in *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977). We there said at 559, 250 N.W.2d at 888: "As we understand the federal and the state constitutional provisions, they do not require or even suggest that jury sentencing is constitutionally required. Whatever the relative merits of sentencing by a judge or jury may be, we need not consider them. Our concern is the constitutionality of the Nebraska system, under the federal and state Constitutions. The relative merits of the one or the other is for legislative and not judicial determination. We find the sentencing procedure provided by the Nebraska statute does not violate either the Nebraska or the federal Constitution." The U.S. Supreme Court has, at least implicitly, rejected the contention that jury determination of the sentence is required. *Proffitt v. Florida, supra*. In that case the Court said in 428 U.S. at 252: "The

basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

The defendant's third contention, asserting that the definitions of aggravating and mitigating circumstances in the statute are so vague and indefinite as to be unconstitutional, has been addressed by this court in a series of cases which refine, clarify, and restrict that definition in response to such arguments. *State v. Simants, supra; State v. Rust, supra; State v. Stewart, supra; State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Otey, supra; State v. Anderson and Hochstein, supra; State v. Harper, supra.* It is clear that the general scheme of § 29-2523 meets the requirements laid down in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). See, *Gregg v. Georgia, supra; Proffitt v. Florida, supra.* We need at this time address only the specific arguments which the defendant makes in this case. The defendant's third, fourth, and fifth assignments overlap and so we will discuss them together.

It is necessary at this time to make some reference to the sentencing panel's order and the findings therein. The

panel made a detailed analysis of the evidence, the provisions of § 29-2523, and the decisions of this court interpreting that statute. It considered each statutory provision separately and made factual findings based upon the evidence adduced at trial and at the sentencing hearing by both the State and the defendant. On the basis of that analysis, it made specific findings as to which aggravating and which mitigating circumstances existed in this case, including the applicability of the statutory provisions which are disjunctive.

We will later, where necessary, make reference to the details of that analysis. At this point, it will suffice to quote the panel's summary of affirmative findings. "The sentencing panel specifically finds that, with regard to the murder of Reuel Van Ness, Jr., aggravating circumstances (b) and (d) have been found to exist beyond a reasonable doubt. By way of clarification, the panel more specifically finds that the second clause of aggravating circumstance (1)(b) ('. . . committed . . . to conceal the identity of the perpetrator') and the latter portion of aggravating circumstance (1)(d) ('. . . manifested exceptional depravity by ordinary standards of morality and intelligence'[)] are applicable in this case.

"With regard to the murder of Maynard Helgeland, the sentencing panel specifically finds that aggravating circumstances (a), (b), and (d) have been found to exist beyond a reasonable doubt. More specifically, the panel finds that the second clause of aggravating circumstance (1)(a) ('The offender . . . has a substantial history of serious assaultive or terrorizing criminal activity') is applicable to the Helgeland homicide, based on the murder four days earlier of Reuel Van Ness, Jr. In addition,

the second clause of aggravating circumstance (1)(b) and the latter portion of aggravating circumstance (1)(d) are applicable to the Helgeland homicide, as they were to the Van Ness homicide."

The panel also reiterated generally its previous, more specific findings that none of the statutory mitigating factors existed, but stated that "the family background and upbringing of the defendant are entitled to consideration as a mitigating factor. . . . " It found that factor did not outweigh the aggravating circumstances.

The defendant's claim of vagueness in the statutory language and deficiency in appellate refinement of definition is directed at the language of § 29-2523(1)(d), which states: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

The defendant argues that under the holding of the U.S. Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the above statutory language, even as limited by the interpretations of this court, is vague and imprecise, thus permitting a standardless imposition of the death penalty. We now turn to an examination of *Godfrey v. Georgia, supra*. Under Georgia law, if the jury finds the defendant guilty, it is instructed by the court at a separate sentencing phase of the trial on the law of aggravating and mitigating circumstances. The jury then recommends a sentence to the court. As part of that recommendation it must specifically state the supporting aggravating circumstance or circumstances which it finds exist beyond a reasonable doubt. The jury in that case found beyond a reasonable doubt

" 'that the offense of murder was outrageously or wantonly vile, horrible inhuman.' " 446 U.S. at 426. The trial court accepted the jury's recommendation, and the Supreme Court of Georgia affirmed. The U.S. Supreme Court reversed the judgment insofar as it levied a death penalty.

We now quote from or paraphrase pertinent portions of the *Godfrey* opinion: "Under Georgia law, a person convicted of murder may be sentenced to death if it is found beyond a reasonable doubt that the offense 'was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity or mind, or an aggravated battery to the victim.' Ga. Code § 27-2534.1(b)(7) (1978). In *Gregg v. Georgia*, 428 U.S. 153, the Court held that this statutory aggravating circumstance (§ (b)(7)) is not unconstitutional on its face. Responding to the argument that the language of the provision is 'so broad that capital punishment could be imposed in any murder case,' the joint opinion said:

" 'It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.' [Citation omitted.]" 446 U.S. at 422-23.

In *Godfrey v. Georgia, supra*, the defendant was found guilty and sentenced to death for the murders of his wife and mother-in-law. Briefly, the circumstances of the crimes were that the defendant and his wife were having marital difficulties. When he threatened her with a knife, she left the family home. She commenced an action for

divorce, and a court hearing was set. Before the hearing, the defendant, on several occasions, asked his wife to return. At some point during this period she moved in with her mother. The petitioner believed that the mother was actively interfering with a reconciliation. On the day before the crimes, the defendant's wife called him. She said reconciliation was impossible, and allegedly demanded all proceeds from the sale of their home. A similar telephone conversation took place about an hour later. The wife at that time allegedly stated that her mother supported her position. The wife then hung up the telephone. Defendant obtained a shotgun and walked to his mother-in-law's trailer home. He saw his wife, mother-in-law, and young daughter playing cards. He fired through a window, killing his wife. He entered the trailer and struck his 11-year-old daughter with the gun barrel and then shot his mother-in-law. Both of the women died instantly from gunshot wounds to the head.

"The issue now before us is whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution." 446 U.S. at 423. "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or

wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.

"The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance. Ga. Code § 27-2537(c)(2) (1978)." 446 U.S. at 428-29.

The U.S. Supreme Court then went on to discuss previous opinions of the Georgia Supreme Court interpreting Ga. Code Ann. § 27-2534.1(b)(7) (Rev. 1978) and noted that in those cases the Georgia court had appropriately defined and limited the applications of the § 27-2534.1(b)(7) language. It held that in the *Godfrey* case, the Supreme Court of Georgia had not followed the criteria previously established, and concluded: "Nothing said on appeal by the Georgia Supreme Court indicates that it took a different view of the evidence. The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the *Harris* and the *Blake* cases. In holding that the evidence supported the jury's § (b)(7) finding, the State Supreme Court simply asserted that the verdict was 'factually substantiated.' "

446 U.S. at 432. The Court further stated: "The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma." 446 U.S. at 433.

The Court, in n. 15, stated at 432-33: "The sentences of death in this case rested exclusively on § (b)(7). Accordingly, we intimate no view as to whether or not the petitioner might constitutionally have received the same sentences on some other basis. Georgia does not, as do some States, make multiple murders an aggravating circumstance, as such."

In short, the U.S. Supreme Court's vacation of the death sentence in *Godfrey* rested upon: (1) Lack of precise instructions to the jury and impreciseness of the jury's findings. (2) Failure of the Supreme Court of Georgia to follow its own previously established criteria interpreting § 27-2534.1(b)(7). (3) The court's apparent failure to independently review the factual findings of the trial court and jury. (4) As the U.S. Supreme Court noted, the victim was causing the actor "extreme emotional trauma," and the crime was motivated by overwhelming passion. (It should be noted the factual circumstances in *Godfrey* are quite different from the one before us.) (5) The jury was not instructed on the restricted definition of § 27-2534.1(b)(7), which had been adopted by the Georgia Supreme Court.

The holding of the U.S. Supreme Court in *Godfrey* clearly does not control in the case before us for a number of reasons. First, the sentencing panel in the case at bar

made very specific findings by way of meticulous analysis of the evidence and careful application of the statute as well as this court's prior interpretations thereof. The panel is not an uninstructed jury. Second, the imposition of the death penalty in the case before us did not rest wholly upon a finding of the existence of aggravating circumstance (1)(d) of § 29-2523, which we will discuss in more detail later since it is the heart of the defendant's argument. Instead, the sentence in this case is supported by the existence of several aggravating circumstances completely supported by uncontroverted evidence. Third, the factual circumstances of the murders in our present case are quite different from those in *Godfrey*, as we have discussed earlier. Fourth, this court does, as we hereafter set forth, review and independently confirm the panel's findings. None of the factors leading to reversal in *Godfrey* exist in this case.

We now turn to the defendant's claim of vagueness. The U.S. Supreme Court in *Godfrey* did not overrule its previous holding in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). The language of the Georgia statute, § 27-2534.1(b)(7), was not unconstitutional on its face. Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily torturous to the victim" and to cases where torture, sadism, or the imposition of extreme suffering exists. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d

849 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). In this case the sentencing panel found that aggravating circumstance did not exist. We agree. The second circumstance pertains to the state of mind of the actor. In *State v. Stewart, supra*, we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court). The sentencing panel found the second circumstance did apply. We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft of regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life.

The sentence in this case does not rest wholly upon the findings with reference to circumstances (1)(d) of § 29-2523. As the sentencing panel found, and as we independently find, additional independent aggravating circumstances exist. In both the Van Ness and the Helgeland murders, the crimes were committed to conceal the identity of the perpetrator. § 29-2523(1)(b). This, Moore acknowledged, was one of his motives for the killings. In

the Helgeland murder there existed yet a third aggravating circumstance, a substantial history of violence, as demonstrated by the Van Ness murder a few days earlier. § 29-2523(1)(a). The sentencing panel carefully analyzed this element in accordance with our prior interpretations. *State v. Rust, supra; State v. Holtan, supra.* In *Holtan* we said at 546, 250 N.W.2d at 879: " 'History' refers to the individual's past acts preceding the incident for which he is on trial and 'substantial,' . . . refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence." See *State v. Perry,* 199 Neb. 656, 261 N.W.2d 95 (1977).

The defendant argues that in imposing the sentence of death, the panel did not apply the provisions to 1978 Neb. Laws, L.B. 711, §§ 29-2519 to 29-2521.04. This argument is founded in part upon the premise that in *State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979), this court did not properly interpret L.B. 711.

The act in question provides in part: "(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances." § 29-2521.01.

"The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973.

Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur." § 29-2521.02.

"The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524." § 29-2521.03.

"Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524." § 29-2521.04.

In *State v. Williams, supra,* we held that L.B. 711 required this court to review only cases in which the defendant was found guilty of first degree murder, and in *State v. Welsh,* 202 Neb. 249, 275 N.W.2d 54 (1979), we held that the procedure is applicable in this court only when the death penalty is imposed. The defendant now argues that our reviews have been inadequate, and, in his brief, states: "The concern of the Nebraska Legislature was directed, in part, in insuring that there is uniformity throughout the State in death sentencing. Section 29-2521.01, R.S. Supp. 1978. Obviously, to consider only

first-degree murder convictions is to exclude from determination a large group of homicides in which defendants avoided death by being charged with lesser crimes than first-degree murder or by pleading to lesser charges, or by other acts of prosecutorial discretion in interpreting the charging facts. It is a hollow review indeed if these cases are excluded from review. It becomes a cruel facade if a defendant's case is reviewed only against other capital cases and not against lesser homicides which might involve the same or similar circumstances."

In *State v. Williams, supra* at 76, 287 N.W.2d at 29, we said: "To interpret the language of L.B. 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues." We did not there elaborate on the constitutional problems except to indicate that they relate to the constitutional division of powers between the branches of government, specifically mentioning prosecutorial discretion. The prosecutor is obviously a member of the executive branch of government. We now find it necessary to delineate the reasons why a literal application of L.B. 711 would unconstitutionally encroach upon the judicial function. In so doing, we will define more precisely the limits within which L.B. 711 may constitutionally be applied.

We first state the underlying legal principles and then illustrate their application. Neb. Const. art. II, § 1, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others,

except as hereinafter expressly directed or permitted." A similar division of powers, under the U.S. Constitution is held to exist by implication. Corwin's The Constitution and What It Means Today at 6-7, 204 (14th ed. H. Chase & C. Ducat 1978); *Hampton & Co. v. United States*, 276 U.S. 394, 48 S. Ct. 348, 72 L.Ed. 624 (1928); *Hayburn's Case*, 2 Dall. 409, 2 U.S. 409, 1 L. Ed. 436 (1792).

The separation of powers doctrine imposes restrictions upon the legislative branch to limit the judicial functions of the courts. The Legislature cannot, by subsequent legislation, divest rights which have vested by virtue of a judgment. *City of Wayne v. Adams*, 156 Neb. 297, 56 N.W.2d 117 (1952). It cannot enact legislation to retroactively open or vacate a judgment. *Mooney v. Drainage District, on rehearing* 134 Neb. 192, 278 N.W. 368 (1938), *cert. denied* 305 U.S. 622, 59 S. Ct. 84, 83 L. Ed. 398 (1938). The limits of the jurisdiction conferred upon the Supreme Court by the Constitution may not be increased or extended by legislative enactment. *State ex rel. Wright v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937); *Miller v. Wheeler*, 33 Neb. 765, 51 N.W. 137 (1892); *State v. Hall*, 47 Neb. 579, 66 N.W. 642 (1896). It cannot change procedures established by the Constitution. *State ex rel. v. Ellis*, 156 Or. 83, 66 P.2d 995 (1937). It cannot interfere with the judicial function of adjudicating the fact of an acquittal. *In re Johnston*, 3 Cal. 2d 32, 43 P.2d 541 (1935). It may not reverse a judgment. *Roberts v. The State*, 160 N.Y. 217, 54 N.E. 678 (1899). It may not direct the disposition of a case in which jurisdiction has attached. *State v. Costen*, 141 Tenn. 539, 213 S.W. 910 (1919). It is to be clearly implied from the foregoing principles that the Legislature cannot

direct the disposition of one case by the factual determinations in another.

It is apparent from the language of § 29-2521.01(5) and § 29-2521.02 that the Legislature attempts to impose a mandate upon this court to look behind prosecutorial judgments concerning the charges to be filed, jury verdicts determining the particular degree of homicide, and then, based upon our independent findings of the facts in those adjudicated cases, to determine the penalty in the case before us.

We must examine the constitutional import of the foregoing legislative purpose. In examining prosecutorial discretion we would of necessity have to independently gather evidence. The gathering of evidence is not a judicial function but one of the executive. We would then determine what charges we think should have been filed. Again, this is an executive function of the prosecutor. We would make a judgment about the chances of a conviction as against an acquittal, again an executive function. We would need to weigh the advisability of a plea bargain to secure a conviction on a lesser charge in order to avoid a likely acquittal of all charges. These are all clearly executive an not judicial functions.

It must be borne in mind that not all homicide convictions result in appeals to this court. The following illustrates the Legislature's intrusion into the judicial function under L.B. 711. If a person is charged with murder in the first degree but convicted of a lesser degree, of homicide, and if L.B. 711 is to be applied literally, we would then, for purposes of reviewing the case before us, disregard the factfindings of the jury in

the so-called "analogous" case. Such a procedure would be constitutionally objectionable for a number of reasons. First, it would require this court to find facts in a case not before it. Secondly, it would constitute an attempt by the Legislature to make the factfindings of one case determinative of the sentence in another case on review. It is plain that under the principles we have earlier cited, that legislation which attempts to achieve such results is an intrusion on the judicial function, contrary to the separation of powers doctrine, and thus violates article II, § 1.

Another effect of L.B. 711 would be to unconstitutionally restrict the appellate review powers of this court under Neb. Const. art. I, § 23, as the legislation attempts to bind this court by requiring it to apply sentences imposed in some "analogous" case in a district court. It is clear that applying such a standard would restrict a defendant's right to an independent review by this court under article I, § 23, of the Bill of Rights of our Nebraska Constitution. This section provides: "In all cases of felony the defendant shall have the right of appeal to the Supreme Court; and in capital cases such appeal shall operate as a supersedeas to stay the execution of the sentence of death, until further order of the Supreme Court."

Upon this closer review of L.B. 711, it is clear the Legislature in that act attempts to exercise the judicial function in violation of the Constitution. Sections 2 and 3 of L.B. 711 must be restricted in their application to a comparison in this court of only those cases in which the defendant in the District Court has been convicted of murder in the first degree.

L.B. 711 thus construed is coextensive with our duty under the federal Constitution, under our own state Constitution, and under the statutory provisions for automatic review to determine in the death penalty cases which come before us whether the provisions of § 29-2523 are properly applied, and to assure the death penalty is not arbitrarily and capriciously imposed. *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977). We will, of course, continue to make comparisons. Each District Court will continue to furnish to this court, in accordance with our previous administrative order, the records of all convictions of first degree murder not appealed to this court. § 29-2521.04. If either the State or the defendant wishes to call to the attention of the sentencing judge or sentencing panel, for the purposes of comparison, the facts and sentence in any case of first degree homicide which has not been appealed to this court, it should be done at the sentencing hearing by means of admissible evidence for which proper foundation is laid. This, of course, will mean, in most cases where the fact is not admitted or is challenged, producing the official records or pertinent portions thereof of the case which is to be called to our attention.

At the sentencing hearing in this case the defendant introduced an exhibit related to the case of *State v. Cecil Henry Floyd* in the District Court for Hamilton County, Nebraska. This is one of the unappealed cases reviewed by this court in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). Although not specifically argued, it clearly appears the apparent purpose of introducing the exhibit

was to raise the issue of whether an isolated case in which the death penalty perhaps should have been imposed, but was not, becomes the standard which governs all capital cases before this court.

In the exhibit just referred to above is a two-page typewritten summary, obviously prepared by counsel, which among other things contains the following statement: "*Source of Information,*" followed by the name of the prosecutor and defense counsel in that case. The summary otherwise purports to show that Floyd, previous to the Nebraska homicide (felony murder in the course of a robbery), was serving a term of life imprisonment for homicide in Indiana and had pled guilty to three homicides in Florida. We have again reviewed the official transcript of the *Floyd* case. Proof was made in that case of the Indiana conviction only and none of the circumstances of the Indiana case are shown by the record. The only pertinent other evidence adduced at the sentencing hearing was the testimony of the victim's mother, in which she requested the death penalty not be imposed, and the testimony of the defendant Floyd, in which he stated he had not intended to kill the victim but that the gun discharged in the course of a struggle when the victim attempted to take the weapon away from him. The defendant also recited a history of mental illness.

In the *Floyd* case the sentencing judge, in ruling upon an objection to the presentence investigation report, stated he would take into consideration only those matters therein which were properly before him i.e., insofar as other murder convictions were concerned, those that were proved by proper evidence and not the hearsay

testimony of defense counsel and prosecutor. The sentencing judge did not make detailed findings as to aggravating and mitigating circumstances. He apparently regarded the imposition of the penalty as being within his "discretion." He imposed a sentence of life imprisonment, to be served consecutive to the Indiana life sentence and consecutive to any other sentence the defendant might serve elsewhere, allowing no credit on the Nebraska life sentence for any time served elsewhere. The court directed that the defendant be returned to Indiana and that "holds" be placed by the Indiana sheriff as well as any other states' sheriffs in which the defendant was wanted. It may be that the death sentence should have been imposed in the *Floyd* case had proper proof been made, but such a determination is impossible from the limited record before us. The record showed no competent proof of the alleged Florida homicides or of the circumstances surrounding them. Nor was there any proof of the circumstances surrounding the Indiana case. If the State wishes to prove as an aggravating circumstance a conviction of the defendant in other states, it must do so by authenticated copies of such conviction unless, of course, the fact is admitted.

Our reading of *Godfrey* does not lead us to an understanding that an isolated, unappealed trial court judgment is to be the standard by which all other sentences must be judged. The U.S. Supreme Court's purpose in that case was to mandate the death penalty not be inflicted arbitrarily and capriciously. The Court imposed upon the states the duty of defining the circumstances under which the death penalty should be imposed in such a way as to obviate "standardless" sentence. Section 29-2523, as

interpreted and limited by this court, does afford "specific and detailed guidance" in the imposition of sentence and makes "rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

The defendant argues that the sentencing panel erred in finding that a mitigating factor, to wit, "(2)(a) The offender has no significant history of prior criminal activity," did not exist. The record disclosed that the defendant had one previous felony conviction, auto theft, for which he served a term of 1 to 2 years in the Nebraska Penal and Correctional Complex, and that he admitted having forged approximately $1,100 in checks prior to the crimes involved here. The panel also mentioned that he had a juvenile record of lesser offenses. The defendant argues that "consideration" of the latter was error. We hold that this particular juvenile record should be disregarded. What, if any, offenses in a juvenile record should be considered and under what category of aggravating or mitigating factors will obviously depend upon the nature of the act. Nonetheless, the commission of two felonies cannot support a finding that there is no significant prior criminal history. In any event, this mitigating factor, even if it were said to exist, does not, even when considered with family history, outweigh the aggravating factors.

The records and the convictions since *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), which we have reviewed disclose that the standards of § 29-2523 are being carefully applied by the sentencing judge or panel.

The defendant asserts that § 29-2523 is unconstitutional because it limits the mitigating factors which may

be considered in determining sentence. There is no basis for this contention. Section 29-2521 provides in part: "[E]vidence may be presented as to any matter that the court deems relative to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received." In *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), we specifically held that the consideration of mitigating factors or circumstances was not limited by the statute. Evidence in mitigation need only be relevant and probative. The defendant cannot complain of a provision so obviously open ended in the accused's favor.

The defendant's seventh assignment is as follows: "A conviction and sentence in a capital case cannot be sustained unless it appears, beyond a reasonable doubt, that no error in the fact-finding of trial contributed in any way to the jury's determination of the guilt." The defendant's argument on this point is so convoluted as to literally make no sense. The defendant has made no claim of error in the factfinding process leading to the determination of guilt. We have examined the record and found none. The defendant was guilty beyond any doubt at all.

The defendant's eighth assignment asserts that the State has the burden of proving beyond a reasonable doubt that no mitigating factor exists. He cites no authority for this proposition. None seems to exist. There is no evidence or claim that the State suppressed any favorable evidence. If there were any mitigating factors other than

those shown, the defendant is in the best position to know and reveal those factors.

The death sentence in this case is affirmed.

AFFIRMED

KRIVOSHA, C.J., and WHITE, J., concur in that portion of the opinion affirming the conviction, and dissent from that portion of the opinion affirming the imposition of the death penalty. We would have sentenced the appellant to be confined for the balance of his natural life.

APPENDIX D

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, -vs.- CAREY DEAN MOORE, Defendant.	DOCKET 106 NUMBER 55 ORDER OF SENTENCE

This matter came on for sentencing of the defendant, Carey Dean Moore, on this, the 20th day of June 1980. The defendant was present in person with his attorney, Lawrence J. Corrigan. The State of Nebraska was represented by Richard J. Epstein.

The Court, pursuant to the provisions of Section 29-2201, Nebraska Revised Statutes, informed the defendant that on April 14, 1980, he had been convicted on two counts of the crime of Murder in the First Degree.

The Court then asked the defendant if the defendant or his counsel had anything to say as to why judgment and sentence should not be passed against him. Neither the defendant nor his counsel made any statement or showing as to why sentence should not be imposed at this time.

The Court then asked the defendant and his counsel if there were any other matters to be presented, in addition to the evidence submitted and the arguments made on May 16 and May 22, 1980, concerning the nature of the sentence to be imposed on the defendant. No further evidence was submitted, and no further argument was made.

The Court, consisting of a three-judge sentencing panel composed of Judges John E. Clark, George H. Stanley, and Joseph Martin, unanimously finds as follows:

I

The background for the enactment of sections 29-2519 to 29-2546, inclusive, Nebraska Revised Statutes (Reissue 1975), as amended by L.B. 711, Laws 1978, has been fully set forth in the decisions of the Nebraska Supreme Court in the following cases: *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977) (*Holtan* I); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977) (*Simants* I); *State v. Perry*, 199 Neb. 656, 261 N.W.2d 95 (1977) (*Perry* I); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); and *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980) (*Holtan* II). The Nebraska Supreme Court has also set forth in those cases certain guidelines concerning the aggravating and mitigating circumstances, which guidelines are to be considered by the sentencing authority in applying sections 29-2522 and 29-2523.

II

In this case, a trial to the Court alone, sitting without a jury, commenced on April 8, 1980, and on April 14, 1980, the Court found the defendant guilty on both counts of Murder in the First Degree while in the perpetration of or attempt to perpetrate a robbery. Judgment was entered against the defendant on each count on the same date. Sentencing was deferred pending completion of a pre-sentence investigation by the Douglas County Adult Probation Office. A hearing to allow the presentation of evidence and argument on the aggravating and mitigating circumstances was tentatively scheduled for May 20, 1980. Pursuant to a request of the trial judge made by letter on April 15, 1980, the Honorable Norman Krivosha, Chief Justice of the Nebraska Supreme Court, designated District Judges George H. Stanley and Joseph Martin to sit with the trial judge, Judge John E. Clark, as a panel to make the determination of the sentence to be imposed on the defendant.

On May 16, 1980, a hearing was held by the trial judge on the defendant's motion challenging the constitutionality of the Nebraska death penalty statutes on a number of grounds, among them the alleged vagueness and overbreadth of the statutory aggravating and mitigating circumstances, as well as the Court's alleged inability to comply with the comparative review provisions of L.B. 711, Laws 1978, codified as sections 29-2521.01 to 29-2522, inclusive, Nebraska Revised Statutes.

The defendant's objections to the constitutionality of the Nebraska death penalty statutes were overruled on that same date.

Also on May 16, 1980, the defendant's motion for a new trial was argued and taken under advisement by the trial judge. That motion has been denied by a separate order on this date.

III

A hearing to allow the presentation of evidence and argument on the aggravating and mitigating circumstances was held before the three-judge panel on May 22, 1980. The order of procedure to be followed at the hearing had previously been set forth by the trial judge in a written order dated May 1, 1980.

Prior to the hearing on May 22, 1980, a complete transcript of the testimony adduced at the defendant's trial was furnished to each of the members of the three-judge panel. This testimony was received and examined by each of the judges prior to the hearing on May 22, 1980. In addition, all of the exhibits which were offered and received in evidence at trial were examined by each of the judges of the sentencing panel.

The following items were received in evidence at the sentencing hearing and have been considered by the members of the panel, along with the trial testimony and exhibits, in reaching their conclusion:

(A) Offered by the State of Nebraska:

(1) The pre-sentence investigation report of the defendant, including police

reports, prepared by the Douglas County Adult Probation Office. Included therein is a copy of the presentence investigation of the defendant in connection with his previous conviction of auto theft (Docket 26, Number 252, Sarpy County District Court), together with all pertinent reports. None of these documents was marked as an exhibit.

(2) Exhibit No. 114, a certified copy of the Information and Commitment of the defendant to the Nebraska Penal and Correctional Complex, dated May 17, 1976, for a term of from one to two years on the charge of auto theft referred to previously.

(3) Exhibit No. 115, a certified copy of the State Complaint in the Municipal Court of the City of Omaha, Douglas County, Nebraska, dated November 26, 1975 (Case No. C74-5662), charging the defendant with petit larceny, of which charge he was found guilty on December 30, 1975.

(4) Exhibit No. 116, a certified copy of the State Complaint in the Municipal Court of the City of Omaha, Douglas County, Nebraska, dated December 22, 1977 (Case No. C77-14404), charging the defendant with petit larceny, of which charge he was convicted on his plea of guilty and was fined $25.00 on January 4, 1978.

(5) Exhibit No. 117, a certified copy of the City Complaint in the Municipal

Court of the City of Omaha, Douglas County, Nebraska, dated May 22, 1978 (Case No. M78-4633), charging the defendant with loitering and prowling, of which charge he was convicted on his plea of guilty and was sentenced to imprisonment in the County Jail for 10 days on May 22, 1978.

(B) Offered by the defendant, Carey Dean Moore:

(1) Character witnesses on behalf of the defendant, including his mother, Eleanor S. Panek; three of his sisters: Elizabeth Ellen Swanson, Bonnie Louise Moore, and Norma Jean (Moore) Heilig; one of his brothers, Ricky Moore; Bill Keck, a counselor at Eppley Chemical Dependency Services in Omaha, Nebraska, who was a counselor at the Youth Development Center at Kearney, Nebraska, in 1973-1974 when the defendant was a resident of that facility; and the defendant himself. These witnesses generally testified with regard to the chaotic family background of the defendant, particularly the history of violence and the frequent beatings administered by the defendant's father to all of his children, especially the defendant and his twin brother.

(2) Exhibit No. 118, a letter dated May 21, 1980, from Margaret Tweddle, M.D., Staff Psychiatrist at Douglas County Hospital and Assistant Professor in the Department of Psychiatry and

Behavioral Science, Creighton University School of Medicine, concerning her evaluation and diagnostic impression of the defendant. Dr. Tweddle concluded that, while the defendant showed no evidence of any psychotic, neurotic, or organic mental illness, he was clearly suffering from a severe, antisocial personality disorder marked by inability to establish or maintain any emotional involvement with other human beings. In addition, Dr. Tweddle noted that the defendant's intelligence level was in the "dull-normal range", with an I.Q. of 84.

(3) Exhibit No. 119, a compilation of material on various homicide cases which was submitted and received to assist the sentencing panel in its application of the comparative review provisions of L.B. 711, Laws 1978. The compilation reflects the disposition of several cases of criminal homicide committed in Nebraska and disposed of prior to the imposition of sentence in the present cases.

The sentencing panel also had before it the District Court file in this case, which, while not marked as an exhibit, was considered by the panel.

Based on the foregoing evidence, the panel proceeded to a consideration of the aggravating and mitigating circumstances set forth in sections 29-2522 and 29-2523, Nebraska Revised Statutes, and to the comparative review required by L.B. 711, Laws 1978.

IV

As to the aggravating circumstances, the statutory definitions of which are hereinafter set forth, the sentencing panel unanimously finds as follows:

1. The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity (Section 29-2523(1)(a).

Evidence offered by the State under this subsection consisted of the pre-sentence investigation report of the defendant prepared by the Douglas County Adult Probation Office; Exhibit 114, a certified copy of the Information and Commitment of the defendant, dated May 17, 1976, on the charge of auto theft; and Exhibits 115 through 117, inclusive, certified copies of the State Complaints charging the defendant with petit larceny and of the City Complaint charging the defendant with loitering and prowling.

No evidence has been submitted to the effect that, prior to the convictions for which he is now being sentenced, the defendant had previously been convicted of either another murder or a crime involving the use or threat of violence to the person, and thus neither part of the first clause of this subsection is applicable to the murder of either Reuel Van Ness, Jr., or Maynard Helgeland.

In *State v. Rust*, 197 Neb. at 535, 250 N.W.2d at 872-873, the Nebraska Supreme Court interpreted the second clause of this aggravating circumstance (". . .

substantial history of serious assaultive or terrorizing criminal activity") to refer to events and incidents prior to, and not part of, the events out of which the current charge arose. In *State v. Holtan,* 197 Neb. at 546, 250 N.W.2d at 879, the Supreme Court had this to say:

> "History" refers to the individual's past acts preceding the incident for which he is on trial and "substantial" . . . refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence.

In *State v. Perry,* 199 Neb. at 669-670, 261 N.W.2d at 102, the Supreme Court held that the sentencing panel had improperly received evidence of an escape plan of the defendant, that evidence being a letter purportedly written by the defendant after his conviction but prior to sentencing, in which the defendant proposed a plan whereby $12,000 in coins would be offered to help recruit five men to enable the defendant to escape from custody. The Court re-emphasized the fact that this clause of aggravating circumstance (1)(a) does not include events or occurrences which are part of the circumstances surrounding the current charge but refers solely to earlier acts. Since evidence of an escape plan did not relate to an earlier act, the Court held that it should not have been received by the sentencing panel in *Perry.*

With the foregoing guidance in mind, the sentencing panel concludes that, with regard to the homicide of Reuel Van Ness, Jr., the second clause of aggravating circumstance (1)(a) is not applicable since, prior to that homicide, the defendant had no history whatever of

serious assaultive or terrorizing criminal activity. With regard to the homicide of Maynard Helgeland, however, the sentencing panel concludes that, as the State contends, the second clause of aggravating circumstance (1)(a) *is* clearly applicable beyond a reasonable doubt because the killing of Reuel Van Ness Jr., four days earlier constitutes a history of assaultive or terrorizing criminal activity which is both "substantial" and "serious" as those terms are explained in *State v. Holtan, supra.*

2. The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator (Section 29-2523(1)(b)).

In *State v. Rust*, 197 Neb. at 536-537, 250 N.W.2d at 873, the Nebraska Supreme Court held that the murder committed there could not have concealed commission of the robbery or the related assaults because it did not in fact destroy, nor was it an attempt to destroy, evidence of those crimes. The Supreme Court went on to say:

> We hold that a murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed as, for example, in a case where murder by arson is committed to conceal the evidence of commission of another crime, *e.g.*, another murder or burglary, or where the murder of a witness is likely to prevent the discovery of a prior crime not otherwise likely to be discovered.

The sentencing panel finds that the first clause of this aggravating circumstance (" . . . committed in an apparent effort to conceal the commission of a crime . . . ") is

not applicable to the murder of either Reuel Van Ness, Jr., or Maynard Helgeland, since neither was an attempt to destroy evidence of the homicide itself or of the underlying crime of robbery or attempted robbery.

However, the sentencing panel further finds that the second clause of this aggravating circumstance (". . . committed . . . to conceal the identity of the perpetrator") is clearly applicable to each of the murders in this case beyond a reasonable doubt. Like the victims in the *Stewart, Holtan, Simants, Perry, Williams,* and *Otey* cases, both Reuel Van Ness, Jr., and Maynard Helgeland could later have identified the defendant as the individual who had robbed or attempted to rob each of them. This conclusion is buttressed by specific statements made by the defendant on the evening of August 30, 1979, during an interrogation conducted by Officers Jack M. O'Donnell and Gregory Thompson of the Omaha Police Division at the Floyd County Jail in Charles City, Iowa, where the defendant was in custody. With regard to the homicide of Reuel Van Ness, Jr., and excerpt of the officers' questions and the defendant's responses is as follows:

Q. OK, once they got there you decided to make your robbery, what was your plan to do?

A. You mean . . . you mean if I get in the cab?

Q. Yeah.

A. I was gonna go someplace where it's dark and quiet and there's not too much light and then shoot the guy.

Q. And then rob him?

A. Right.

Q. Why would you just only rob him, I mean, why, you know, why would you wanta shoot him when you just take the money, I mean, you planned this in your mind to shoot'em (him) first?

A. Yes, I did plan it.

Q. How come you planned in mind to shoot him first?

A. Well, I figure the guy probly get by . . . uh iden . . . my identification away.

A similar conversation between the defendant and the same officers occurred shortly thereafter concerning the homicide of Maynard Helgeland:

Q. Why were you going to shoot the man?

A. Just rob him.

Q. Then why would you have to shoot him if you were just going to rob him?

A. I didn't want him to know me but then the first time Van Ness or whoever the guy's name is, I don't know, when I shot him I seen what his eyes looked like and I couldn't take that so just the second as he looked around, that was when I pulled the trigger.

For these reasons, the panel finds that the murders of both Reuel Van Ness, Jr., and Maynard Helgeland were committed to conceal the identity of the perpetrator.

3. The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant (Section 29-2523(1)(c)).

The Nebraska Supreme Court defined this aggravating circumstance in *State v. Rust*, 197 Neb. at 537-538, 250 N.W.2d at 874, as follows:

> We construe this factor to apply (1) to the hired gun, (2) to the hirers of the gun, and (3) to murder motivated primarily by a desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds, or the murder of a testator by a legatee or devisee to secure a legacy or devise.

Although the defendant's half-brother, Donald Moore, was an accomplice in the robbery and homicide of Reuel Van Ness, Jr., it was the defendant who fired the fatal shots, as he did in the homicide of Maynard Helgeland, when he was unaccompanied. Because the murders of Van Ness and Helgeland were committed by the defendant alone, not at the behest of another, and because neither of the murders was committed primarily for pecuniary gain as that term is explained in *State v. Rust*, though it enabled the defendant to keep the proceeds of the Van Ness robbery, the sentencing panel finds that this aggravating circumstance is not applicable.

4. The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence (Section 29-2523(1)(d)).

In *State v. Simants*, 197 Neb. at 566, 250 N.W.2d at 891, the Nebraska Supreme Court pointed out that, though it might well be argued that any killing is atrocious, the Legislature, by the use of this phrase, obviously intended something more than the mere fact that a murder had been committed. The Court cited with approval the explanation of "heinous, atrocious, or cruel" given by the Florida Supreme Court: " . . . directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Later in the *Simants* opinion, the Supreme Court construed the latter portion of this aggravating circumstance (" . . . or manifested exceptional depravity . . . ") as follows:

> In interpreting this portion of the statute, the key word is "exceptional." It might be argued that every murder involves depravity. The use of the word "exceptional," however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence.

In *State v. Rust*, 197 Neb. at 538-539, 250 N.W.2d at 874, this aggravating circumstance was construed to include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering; and in *State v. Holtan*, 197 Neb. at 548, 250 N.W.2d at 880, it was held to exist where the murder is so coldly calculated as to

indicate a state of mind totally and senselessly bereft of regard for human life.

In this case, it is the conclusion of the sentencing panel that, based on the evidence adduced, neither the murder of Reuel Van Ness nor that of Maynard Helgeland was "especially heinous, atrocious, or cruel" within the contemplation of the statute: neither of the killings involved torture, sadism, sexual abuse, or the imposition by the defendant of extreme suffering on the victim. Indeed, based on the autopsy of the respective victims conducted by Dr. Blaine Roffman, as well as the statements of the defendant, death in each case appears to have been the almost instantaneous result of three gunshot wounds inflicted in rapid succession: Van Ness was shot twice in the back and once on the shoulder, while Helgeland was shot three times in the head at very close range. Although there was testimony which indicated that Mr. Van Ness may still have been alive when he was pushed out of his cab at Dam Site 16 by the defendant and his half-brother, neither that fact nor the fact that each of the victims was shot more than once makes either of these crimes "especially heinous, atrocious, or cruel", despite the State's contention to the contrary.

However, it is the further conclusion of the sentencing panel that the latter portion of this aggravating circumstance (" . . . or manifested exceptional depravity by ordinary standards of morality and intelligence") is applicable to each of the murders in this case. "Depravity" is defined by Webster's third New International Dictionary as "the quality or state of being depraved," which, in turn, is defined as "marked by debasement, corruption, perversion, or deterioration." It is certainly

true, as our Supreme Court has recognized on more than one occasion, and as counsel for the defendant argues in the present case, that, in some sense, *any* killing of one human being by another manifests a disregard for human life so as to be considered "depraved". We believe, however, that the facts in this case establish that each of the murders, rather than being the result of panic or impulse on the part of the defendant, was, in the language of *State v. Holtan*, "so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life."

The defendant's own statements, in his confession to Officers O'Donnell and Thompson while in custody at Charles City, Iowa, indicate that these crimes had been in the planning stage for at least a day or two before the Van Ness homicide. Apparently on the evening prior to the Van Ness murder, the defendant had called a number of cabs from a telephone booth somewhere on Farnam Street in the downtown Omaha area to see how quickly each would respond to his call. The defendant then hid somewhere in the vicinity to await each cab's arrival, at which time he checked the cab to determine whether the driver would be a suitable victim, *i.e.*, not too young, since the defendant stated that it was easier for him to shoot an older man rather than a younger man nearer his own age. On the evening of the Van Ness homicide, the defendant's plan was to call one cab at a time from the Smoke Pit restaurant, and, if the driver who responded "wasn't too old," the defendant would just not identify himself as the fare for which the cab had been summoned. When Mr. Van Ness arrived at the Smoke Pit on August 22, 1979, the defendant determined that this was the driver who

would be robbed and shot because "he wasn't too young".

A similar pattern of events unfolded on August 26, 1979. The defendant went to the Greyhound Bus depot at 18th and Farnam Streets in Omaha that evening, and, when he saw a lone cab with an older driver parked at the taxi stand outside the depot, he got into the cab and directed the driver to take him to the Benson area. According to the defendant, this particular cab and driver were selected both because there were no other cabs at the taxi stand at the time, thus decreasing the chances of the defendant's being identified, and because the driver was an older man. The defendant then stated that, as previously discussed, he had planned ahead of time to rob and shoot the driver of whichever cab he selected.

Based on the foregoing analysis, it is the conclusion of the sentencing panel that each of these murders was so coldly calculated as to indicate a state of mind totally and senselessly bereft of all regard for human life, thus manifesting "exceptional depravity by ordinary standards of morality and intelligence" so as to make aggravating circumstance (1)(d) applicable to each of these killings.

5. At the time the murder was committed, the offender also committed another murder (Section 29-2523 (1)(e)).

The State contends that, despite that fact that the killings for which the defendant is now subject to sentence occurred four days apart, their method of commission and the motive which underlay them were so nearly

identical as to make this aggravating circumstance applicable. In support of his contention that this aggravating circumstance should be applicable here, counsel for the State makes two analogies, one to the case of John Wayne Gacy, who was recently convicted in Illinois of the homosexual slayings, following his offer of employment to them, of some thirty young men over a period of several months, the other to a hypothetical situation in which a defendant murders one person a day for ten consecutive days.

However, it is the conclusion of the sentencing panel that, despite the similarity of motive and method of operation, these killings were too remote in time to be considered as having been committed "at the same time". Rather than being part of a continuing sequence of events or the result of a continuing course of conduct on the part of the defendant, these murders were the result of two separate, though similar, incidents, and the panel thus concludes that aggravating circumstance (1)(e) is not applicable to either of the murders in this case.

6. The offender knowingly created a great risk of death to at least several persons (Section 29-2523(1)(f)).

The Nebraska Supreme Court has interpreted this aggravating circumstance, in *State v. Simants*, 197 Neb. at 567, 250 N.W.2d at 891, and *State v. Stewart*, 197 Neb. at 524, 250 N.W.2d at 865, to cover "those situations where the act of the defendant jeopardizes the lives of more than two other persons, such as the use of bombs or explosive devices, the indiscriminate shooting into

groups, or at a number of individuals, or other like situations."

Since Mr. Van Ness was the only person other than the defendant and his half-brother who was present at the scene of the first killing, and since Mr. Helgeland was the only person other than the defendant who was present at the scene of the second killing, the sentencing panel finds that this aggravating circumstance is clearly not applicable to either of the murders in this case.

7. The victim was a law enforcement officer or a public servant having custody of the offender or another (Section 29-2523(1)(g)).

Neither of the victims in this case was a law enforcement officer or a public servant having custody of the defendant or another. The sentencing panel therefore finds that aggravating circumstance (1)(g) does not apply to either of the murders in this case.

8. The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws (Section 29-2523(1) (h)).

The sentencing panel finds that aggravating circumstance (1)(h) is not applicable to either of the murders in this case, since neither of the killings was committed during an attempt by the defendant to avoid arrest or capture, as was the case in *State v. Rust*, 197 Neb. at 541, 250 N.W.2d at 875.

V

As to the mitigating circumstances, the statutory definitions of which are hereinafter set forth, the sentencing panel finds as follows:

1. The offender has no significant history of prior criminal activity (Section 29-2523 (2)(a)).

In applying this mitigating circumstance, the considerations to be taken into account appear to be quiet similar to those used in applying the second clause of aggravating circumstance (1) (a) (". . . substantial *history* of serious assaultive or terrorizing *criminal activity*"). In response to a challenge in *State v. Holtan*, 197 Neb. at 548, 250 N.W.2d at 880, that the term "significant history" was ambiguous, the Nebraska Supreme Court stated that the term did not refer to a slight or inconsequential history of criminal activity but rather to an important, meaningful, or notable history. Earlier in that first *Holtan* opinion, the Court interpreted the term "history" to refer to the defendant's past acts preceding the incident for which he was then being sentenced.

In *State v. Simants*, 197 Neb. at 568, 250 N.W.2d at 892, the Court pointed out that while the term "criminal activity" is somewhat broader than "criminal convictions", it had previously held, earlier in the *Simants* opinion, 197 Neb. at 560, 250 N.W.2d at 888, that criminal activity must be proven beyond a reasonable doubt in order to establish the existence of the comparable aggravating circumstance. The Court went on to say: "While we concede that

criminal activity may be proved, obviously the burden of proof is greater in the absence of prior convictions."

The defendant in *State v. Peery* had a record of criminal activity which was both lengthy and violent, including convictions for the following offenses: felony escape from custody; armed robbery; burglary; an auto theft and three robberies committed while out on bond; robbery and rape; and assault and attempted escape. Although the record of criminal activity of the defendant in the present case displays nowhere near the propensity for violence of the defendant in *Peery*, it is certainly a *lengthy* record, and, for that reason, the sentencing panel deems it to be "significant" within the meaning of this mitigating circumstance. As indicated previously in the discussion of aggravating circumstance (1) (a), the defendant has a prior felony conviction for auto theft, two prior misdemeanor convictions for petit larceny, and a conviction for loitering and prowling in violation of a municipal ordinance. In addition, he has what his counsel appropriately characterized as a "horrible" juvenile record, as more fully set forth in the pre-sentence investigation report of the Sarpy County Probation Office, including numerous instances of auto theft. While juvenile offenses are not, technically speaking, "criminal" in nature, though they would be such if committed by an adult, the defendant's juvenile record does establish beyond a reasonable doubt that he has run afoul of the law on numerous prior occasions. That fact, when coupled with the defendant's previous adult convictions and his admission of having forged approximately $1,100 worth of stolen checks in August, 1979, both of which the panel deems to be of

more significance than his juvenile record, leads the sentencing panel to conclude that mitigating circumstance (2) (a) is not applicable to either of the murders in this case.

2. The offender acted under unusual pressures or influences or under the domination of another person (Section 29-2523(2) (b)).

In *State v. Holtan*, 197 Neb. at 547, 250 N.W.2d at 880, the Nebraska Supreme Court held that acts performed under unusual pressures or influences or under the domination of another person contemplate only outside pressures, not those created by the defendant's own acts.

The psychiatric evaluation of the defendant by Dr. Tweddle which has been received in evidence does not establish that the defendant was acting under unusual pressure other than those which may have been created by his own callous, irresponsible selfishness. These pressures, if any, were not *external* but rather were ones created largely by the defendant himself. There is also no indication that the defendant was acting under the domination of another person at the time of either of the homicides for which he is now subject to sentence: the defendant was the primary actor in the killing of Reuel Van Ness, Jr., and he was the lone actor in the killing of Maynard Helgeland. For these reasons, the sentencing panel concludes that mitigating circumstance (2) (b) is not applicable to either of the murders in this case.

3. The crime was committed while the offender was under the influence of extreme mental or emotional disturbance (Section 29-2523 (2) (c)).

In responding to a challenge that this mitigating circumstance was vague and indefinite, the Nebraska Supreme Court, in *State v. Holtan*, 197 Neb. at 548, 250 N.W.2d at 880, construed the phrase "extreme mental or emotional disturbance" to mean one which exists in the highest or greatest possible degree, very great, intense, or most severe.

The psychiatric evaluation of the defendant by Dr. Tweddle concludes that the defendant is a profoundly disturbed young man who quite clearly has a severe antisocial personality disorder characterized by gross selfishness, callousness, irresponsibility, impulsiveness, and inability to feel guilt or to learn from experience or punishment. Dr. Tweddle also noted that there was no evidence of any psychotic, neurotic, or organic mental illness on the part of the defendant.

Based on the foregoing evaluation, the sentencing panel concludes that, while the defendant was indeed suffering from a marked personality disorder at the time of the homicides in question, such disorder was not of sufficient magnitude or intensity to act as a mitigating circumstance in this case. The panel therefore finds that mitigating circumstance (2) (c) is not applicable to either of the murders in this case.

4. The age of the defendant at the time of the crime (Section 29-2523 (2) (d)).

In *State v. Simants*, 197 Neb. at 568, 250 N.W.2d at 892, the Nebraska Supreme Court interpreted this language to refer to a child of tender age, a juvenile, or a person of advanced years, where senility might be a factor. In *State v. Holtan*, 197 Neb. at 548, 250 N.W.2d at 880, the same Court rejected criticism of this subsection for failure to specify either a fixed age to be considered or the relative importance of various ages. While youth or extreme age are suggested for consideration; the Supreme Court pointed out that the term "age" is necessarily a relative one, to be considered in the light of varying conditions. It is this relativity, counsel for the defendant suggests, which ought to make this mitigating circumstance applicable here.

At the time these murders were committed, the defendant was almost 22 years old, yet he had not progressed beyond the tenth grade in school, most probably due to his frequent movements into and out of the Youth Development Center at Kearney, Nebraska, during the years when he would normally have been completing high school. In addition, Dr. Tweddle's psychiatric report indicates that the defendant's intelligence level was in the "dull-normal range", with an I.Q. of 84. While these factors would tend to indicate that the defendant may have been less mature than the "average" twenty-one-year old, it is the conclusion of the sentencing panel that the defendant was not so immature that his age should be considered a mitigating circumstance with regard to

either of the murders in this case. Mitigating circumstance (2) (d) is not applicable.

5. The offender was an accomplice in the crime committed by another person and his participation was relatively minor (Section 29-2523 (2) (e)).

In *State v. Simants*, 197 Neb. at 568, 250 N.W.2d at 892, the Nebraska Supreme Court construed this standard to refer to those situations where the offender being sentenced may have been only an aider or an abettor and where his role in the murder was negligible.

The sentencing panel finds that, with regard to the homicide of Reuel Van Ness, Jr., the defendant was the primary actor rather than an accomplice in the crime of another person and that, with regard to the homicide of Maynard Helgeland, the defendant was the lone actor. The panel therefore concludes that mitigating circumstance (2) (e) is not applicable to either of the murders in this case.

6. The victim was a participant in the defendant's conduct or consented to the act (Section 29-2523 (2) (f)).

It can hardly be said that either of the victims in this case either participated in the defendant's conduct in attempting to or actually robbing them or consented to the acts which caused their death. The sentencing panel finds that mitigating circumstance (2) (f) is clearly not applicable to either of the murders in this case.

7. At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result or mental illness, mental defect, or intoxication (Section 29-2523 (2) (g)).

The psychiatric evaluation of the defendant by Dr. Tweddle concludes, and the sentencing panel specifically finds, that, although he suffers from a profound antisocial personality disorder, there is no evidence of any psychotic, neurotic, or organic mental illness on the part of the defendant. Although the defendant's I.Q. had been measured in the low 80's by both Dr. Tweddle and the Youth Development Center at Kearney, and although his intelligence level had been characterized as being in the "dull-normal range", the panel concludes that there is no evidence of mental defect, in the sense of mental retardation or organic brain damage, on the part of the defendant so as to prevent him from either appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of law. There is likewise no evidence that the defendant's capacity was impaired as the result of either drug or alcohol intoxication: although he admitted to having smoked a couple of "joints" of marijuana sometime during the day preceding the Van Ness killing, the defendant further stated that, by the time Mr. Van Ness arrived at the Smoke Pit in response to the defendant's call, the "high" was wearing off and that he knew he shouldn't have robbed and shot his victim. There also is no evidence that the defendant had ingested either drugs or alcohol prior to the Helgeland killing on August 26, 1979.

In conclusion, the sentencing panel finds that mitigating circumstance (2) (g) is not applicable to either of the murders in this case.

VI

In addition to the statutory mitigating circumstances set forth in section 29-2523 (2), Nebraska Revised Statutes, the sentencing panel is aware of the terms of section 29-2521, which provides that, in the proceeding for the determination of sentence, "evidence may be presented as to any matter that the Court deems relevant to sentence, and shall include matters relating to the aggravating and mitigating circumstances set forth in section 29-2523. Any such evidence which the Court deems to have probative value may be received." The panel is also mindful of the emphasis given to this expansive interpretation by the Nebraska Supreme Court in its opinion in *State v. Simants*, 197 Neb. at 555-556, 557, 250 N.W.2d at 886, 887, and by the United States Supreme Court in the plurality opinion of Chief Justice Burger in *Lockett v. Ohio*, 438 U.S. 586, ___, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). Finally, the panel is aware that our Supreme Court, in its recent opinion in *State v. Holtan*, 205 Neb. at 318-319, 287 N.W.2d at 674, specifically directed the trial courts of this state to apply the rule of *Lockett v. Ohio* permitting the introduction of any mitigating evidence proffered by the defendant which the court deems to have probative value as to the defendant's character, even though such evidence does not specifically come within the scope of the statutory mitigating circumstances.

With that guidance in mind, the sentencing panel now addresses itself to the defendant's request that the panel consider, as an additional mitigating factor, the defendant's chaotic family background, which has been described in considerable detail both in the defendant's pre-sentence investigation report and the psychiatric evaluation of the defendant by Dr. Tweddle, as well as by a number of witnesses who testified at the post-trial hearing for the presentation of evidence on the aggravating and mitigating circumstances of these offenses.

To say that the defendant had a terrible childhood is certainly an understatement. The seventh of eleven children, the defendant, along with his twin brother, was beaten both frequently and severely, apparently for any reason whatever, by his alcoholic father, as were other members of the family. There was also testimony that the defendant was taught to shoplift and steal at an early age, although it is unclear precisely who in the family was responsible for this "training". At age eleven, the defendant and his twin brother were removed from the family home by juvenile authorities and were further separated from each other, the defendant apparently having been initially committed to the Youth Development Center at Geneva. From then until the age of eighteen, the defendant lived in a succession of foster and group homes, none for any great length of time, as well as spending numerous stays at the Youth Development Center at Kearney. During this period of time he had very little contact with either his twin brother or any other family members, and that fact, coupled with his frequent movement into and out of various foster homes, apparently

prevented the development of any close, familial relationships. As has been previously mentioned, the defendant has not progressed beyond the tenth grade in school, and his juvenile record is replete with instances of conflict with the authorities. Dr. Tweddle's report gives what is perhaps the most accurate summary of the impact of the defendant's background on his development:

> Clearly he is a profoundly disturbed young man in terms of his severe personality disorder. It seems he has never learned anything throughout his developing years about caring or feeling for others. He does not appear to have any real understanding of what this means. It seems he had been actively taught, or has learned, to hide, suppress or ignore any emotional involvement with anybody. To say that he is totally amoral seems more accurate than viewing his behavior as immoral.

The sentencing panel finds that the family background and upbringing of the defendant are entitled to consideration as a mitigating factor in the determination of punishment to be imposed in this case, but the panel further concludes that this mitigating factor is not of sufficient weight to outweigh the aggravating circumstances which have been found to exist beyond a reasonable doubt in this case.

VII

Section 29-2522, Nebraska Revised Statutes, as amended by L.B. 711, Laws 1978, provides that the sentence for an individual convicted of murder in the first degree under section 28-303 shall be fixed at either death

or life imprisonment, based on the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In making its determination, the sentencing panel is mindful that the Nebraska Supreme Court has pointed out on more than one occasion that the determination of sentence is to be based not on a mere numerical counting of aggravating and mitigating circumstances but rather by balancing the weight given to each. As the Supreme court said in *State v. Simants*, 197 Neb. at 569, 250 N.W.2d at 892-893:

> In the balancing of the aggravating and mitigating circumstances, we emphasize that the death penalty will not be imposed simply because the aggravating circumstances may outnumber the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison outweigh the mitigating circumstances. The death penalty is not to be imposed if sufficient mitigating circumstances exist, which approach or outweigh the weight given to the aggravating circumstances.

The sentencing panel is also guided by the high Court's pronunciation in *State v. Stewart*, 197 Neb. at 518, 250 N.W.2d at 862, where it said:

> It must be emphasized that the procedure to be followed . . . is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

The sentencing panel turns, then, to a consideration of the aggravating circumstances specified by section 29-2522(1), ever mindful of the Nebraska Supreme Court's holding in *State v. Simants*, 197 Neb. at 539, 250 N.W.2d at 888, that the facts upon which the aggravating circumstances are based must be proved beyond a reasonable doubt. The panel is satisfied that its findings of fact have been so proved.

The sentencing panel specifically finds that, with regard to the murder of Reuel Van Ness, Jr., aggravating circumstances (b) and (d) have been found to exist beyond a reasonable doubt. By way of clarification, the panel more specifically finds that the second clause of aggravating circumstance (1) (b) (". . . committed . . . to conceal the identity of the perpetrator") and the latter portion of aggravating circumstance (1) (d) (". . . manifested exceptional depravity by ordinary standards of morality and intelligence" are applicable in this case.

With regard to the murder of Maynard Helgeland, the sentencing panel specifically finds that aggravating circumstances (a), (b), and (d) have been found to exist

beyond a reasonable doubt. More specifically, the panel finds that the second clause of aggravating circumstance (1) (a) ("The offender . . . has a substantial history of serious assaultive or terrorizing criminal activity") is applicable to the Helgeland homicide, based on the murder four days earlier of Reuel Van Ness, Jr. In addition, the second clause of aggravating circumstance (1) (b) and the latter portion of aggravating circumstance (1) (d) are applicable to the Helgeland homicide, as they were to the Van Ness homicide.

It is the sentencing panel's conclusion that the presence of these aggravating circumstances is sufficient to justify imposition of a sentence of death in each case.

The sentencing panel further finds that none of the statutory mitigating circumstances exist as to either of the murders of which the defendant has been convicted, and that the additional mitigating factor which the defendant has presented for the panel's consideration is not of sufficient weight to approach or exceed the weight given to the aggravating circumstances. The panel finds that, upon consideration of the aggravating and mitigating circumstances, the sentence of death should be imposed on the defendant for each of the murders in this case.

Finally, the sentencing panel turns to a consideration of whether the sentences of death imposed in this case are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In this regard, the defendant has presented for the panel's consideration Exhibit Number 119, a compilation of material on various homicide cases decided by several Nebraska courts. Fifteen of the case files present,

in varying factual detail, the synopsis of a situation in which the defendant was convicted of criminal homicide in either the first or the second degree and was sentenced to life imprisonment rather than death, one of which occurred before the effective date of the present death penalty statutes; in a sixteenth case, both of the defendants were convicted of a coldly-calculated contract murder and were sentenced to death; the remaining file in this exhibit contains a skeletal outline of six other criminal homicide cases in which a sentence of death was imposed, all of which have now been reviewed and decided by the Nebraska Supreme Court.

The sentencing panel has considered all of those cases, and, in light of that consideration, the panel finds that the sentences of death imposed in this case are not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

VIII

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, as to Count I of the information, the murder of Reuel Eugene Van Ness, Jr., it is the judgment and sentence of the Court that the penalty of *death* be imposed upon the defendant, Carey Dean Moore; and that his death shall occur on the 20th day of September, 1980, at 6:00 A.M. by the proper person or persons authorized by the statutes of the State of Nebraska by causing to be passed through the body of the said defendant, Carey Dean Moore, a current of electricity of sufficient intensity to cause death; and that the application of such

current shall be continued until the said defendant, Carey Dean Moore, is dead.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, as to Count II of the information, the murder of Maynard Helgeland, it is the judgment and sentence of the Court that the penalty of death be imposed upon the defendant, Carey Dean Moore; and that his death shall occur on the 20th day of September, 1980, at 6:00 A.M. by the proper person or persons authorized by the statutes of the State of Nebraska by causing to be passed through the body of the said defendant, Carey Dean Moore, a current of electricity of sufficient intensity to cause death; and that the application of such current shall be continued until the said defendant, Carey Dean Moore, is dead.

IT IS FURTHER ORDERED that the Clerk of this Court deliver a copy of this judgment and sentence to the Warden of the Nebraska Penal and Correctional Complex or other qualified officer charged with the execution of the sentence, and that said copy shall serve as the order and direction to execute the sentence by inflicting the punishment of death as provided in said sentence and according to the statutes.

IT IS FURTHER ORDERED that a signed or certified copy of this judgment and sentence shall be delivered to the Sheriff of Douglas County, Nebraska, who shall keep said defendant, Carey Dean Moore, in his custody and forthwith deliver him to the Warden of the Nebraska Penal and Correctional Complex.

IT IS FURTHER ORDERED that, in accordance with sections 29-2521.04, 29-2522, 29-2524, and 29-2525,

Nebraska Revised Statutes (Supp.1978), the Clerk of the District Court shall forthwith prepare and file with the Clerk of the Nebraska Supreme Court a transcript of the record of the proceedings, and any other records required by the Supreme Court, without requiring the filing of a petition in error and for which no charge shall be made, in order that the required automatic review of this order of sentence may be made by the Supreme Court as provided by law.

Dated at Omaha, Douglas County, Nebraska, this 20th day of June, 1980.

BY THE COURT:

/s/ John E. Clark
JOHN E. CLARK
District Judge

/s/ George H. Stanley
GEORGE H. STANLEY
District Judge

/s/ Joseph D. Martin
JOSEPH MARTIN
District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-2584

Carey Dean Moore, *

Appellee, *

v. *

Harold W. Clarke, *

Appellant. *

No. 88-2679

Carey Dean Moore, *

Appellant, *

v. *

Harold W. Clarke, *

Appellee. *

Appeals from the United States District Court for the District of Nebraska.

On Motion for Rehearing

Submitted: July 30, 1990

Filed: December 12, 1991

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

In *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), we affirmed the district court's[1] grant of a writ of habeas corpus to Carey Dean Moore on the grounds that the statute under which he was sentenced was unconstitutionally vague as written and as construed by the Nebraska Supreme Court. The Warden of the Nebraska State Penitentiary filed a petition for rehearing, and while his petition was pending before this court, the United States Supreme Court issued two decisions dealing with an Arizona statute similar to the Nebraska statute under which Moore was sentenced. In *Walton v. Arizona*, 110 S. Ct. 3047 (1990), and *Lewis v. Jeffers*, 110 S. Ct. 3092 (1990), the Supreme Court considered the adequacy of a statute designating as an "aggravating circumstance" a situation in which a murder was committed "in an especially heinous, cruel or depraved manner." We asked the parties for additional briefing on these two cases. As we are satisfied that our earlier opinion is consistent with *Walton* and *Jeffers*, we deny the Warden's petition for rehearing.

We first observe that *Jeffers* reasserts the requirement that a state " 'channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable

---

[1] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

the process for imposing a sentence of death." ' " *Jeffers*, 110 S. Ct. at 3099 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)). *Walton* defines our procedure in such cases as follows:

> When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide *some* guidance to the sentencer. In this case there is no serious argument that Arizona's "especially heinous, cruel or depraved" aggravating factor is not facially vague. But the Arizona Supreme Court has sought to give substance to the operative terms, and we find that its construction meets constitutional requirements.

110 S. Ct. at 3057 (emphasis in original).

Our original opinion followed precisely this formula, examining first the question of whether the Nebraska statute's language was too vague to provide guidance to the sentencer, and then determining whether the Nebraska courts had narrowed the statutory language by construction. Our study of the Nebraska decisional law focused first on the decisions of the Nebraska Supreme Court as they existed at the time of Moore's sentencing, and then on the changes brought about by *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *cert. denied*, 484 U.S.

872 (1987), decided some six years later. 904 F.2d at 1228-33.

The relevant language in the Arizona statute in *Walton* and *Jeffers* referred to murder committed in "an especially heinous, cruel or depraved manner," Ariz. Rev. Stat. Ann. § 13-703(F)(6) (Supp. 1988). This is quite similar to the Nebraska statute in this case, which provided it would be an aggravating circumstance if the "murder [were] especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." Neb. Rev. Stat. § 29-2523(1) (d) (Reissue 1985). However, the Arizona Supreme Court had narrowed the meaning of the words "especially . . . depraved manner" in the Arizona statute by defining the phrase to signify that "the perpetrator 'relishe[d] the murder, evidencing debasement or perversion,' or 'show[ed] an indifference to the suffering of the victim and evidence[d] a sense of pleasure' in the killing." 110 S. Ct. at 3058 (quoting *State v. Walton*, 159 Ariz. 571, 587, 769 P.2d 1017, 1033 (1989)).

No such narrowing construction was given the Nebraska statute's "depravity" language, either by the sentencing court or the Nebraska Supreme Court in its affirmance of Moore's sentence. The Nebraska Supreme Court's decision in *Palmer* (handed down some six years after the sentencing and four years after the Nebraska Supreme Court decision in this case), attempted to make the statutory provision more specific, *see* 224 Neb. at 320, 399 N.W.2d at 731-32, but neither the sentencing panel nor the Nebraska Supreme Court applied the narrowed construction in this case.

In *Jeffers*, the Arizona Supreme Court applied the "especially heinous . . . or depraved" language as narrowed in its disposition of the *Walton* case. The United States Supreme Court rejected Jeffers' argument that the aggravating circumstance was vague as applied, and went on to hold that the Ninth Circuit erred in conducting a de novo, case-by-case comparison of the facts of *Jeffers* with those of other cases. 110 S. Ct. at 3102. The Supreme Court defined the issue in *Jeffers* as "solely whether a state court has properly found the existence of a constitutionally narrowed aggravating circumstance." *Id.* Thus, the issue presented in *Jeffers* does not arise until after there has been application of a constitutionally adequate aggravating circumstance, which did not exist in this case.

The significant issue in this case, as we discussed in our original opinion, 904 F.2d at 1228-33, is whether the Nebraska Supreme Court's definition of "exceptional depravity" was unconstitutionally vague. The standard applied to Moore in 1980 was modified substantially six years later by *Palmer*, and the changes found desirable by the Nebraska Supreme Court in *Palmer* then demonstrate that the standards applied to Moore were vague.

As the district court pointed out, *Moore v. Clarke*, CV84-L-754, slip op. at 4 (D. Neb. Sept. 20, 1988), *Palmer* makes no mention of the "so coldly calculated" language, which it referred to as emotionless planning, which was what the sentencing panel relied on in finding this aggravating circumstance in Moore's case. Indeed, we are convinced that *Palmer*, in setting out a different test, points out the vagueness of the statutory language as applied in Moore's sentencing.

Both *Walton* and *Jeffers* discussed the Arizona "heinous, cruel or depraved" language which had been narrowed by construction in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (en banc), *cert. denied*, 461 U.S. 971 (1983), and the Court sustained application of that language as applied to both Walton and Jeffers. 110 S. Ct. at 3058, 110 S. Ct. at 3104. We discussed *Gretzler* in our original opinion. 904 F.2d at 1232 n.6. The Supreme Court's imprimatur on a portion of the *Gretzler* test does not validate Moore's sentencing, since the Nebraska Supreme Court did not adopt *Gretzler*-like language until six years after Moore's sentencing.

Walton also underscores our holding that because a three-judge panel sentenced Moore, any remand will require consideration of *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Walton*, 110 S. Ct. at 3057. This review under *Clemons* could involve the reweighing of the valid aggravating circumstances against the mitigating circumstances, which were not attacked on this appeal.

Walton rejected a claim that the heinous, cruel or depraved factor had been applied in an arbitrary manner, with the state courts failing to distinguish Walton's case from those in which the death sentence had not been imposed – in effect, challenging the Arizona Supreme Court's proportionality review. 110 S. Ct. at 3058. Language in Part 1.D. of our original opinion referring to the need for standards making it possible to distinguish a case in which the death penalty was proper from those in which it was not, 904 F.2d at 1233, must not be read as referring to the need for proportionality review, but

rather to the need for concrete and meaningful definitions of the aggravating circumstances. The proportionality review of Moore's case was not an issue in the appeal before us. Our discussion simply recognized that an examination of the totality of the circumstances surrounding the murder does not cure the lack of objective standards. It is evident that our earlier opinion did not compare Moore's sentence to that of any other murderers.

As we conclude that our opinion is not in conflict with the decisions of the United States Supreme Court issued while the Motion for a Rehearing with Suggestion for Rehearing En Banc was pending, the motion for rehearing is denied.

FLOYD R. GIBSON, Senior Circuit Judge, dissenting from the denial of rehearing.

I respectfully dissent from the panel's decision to deny rehearing in this case. The Supreme Court's decision in *Walton* reinforces my beliefs as expressed in my dissenting opinion in this case. *See Moore*, 904 F.2d at 1234-36 (F. Gibson, Sr. J., dissenting).

I find *Walton* supportive of my earlier view that the Nebraska Supreme Court has provided sufficient guidance to prevent the arbitrary imposition of the death penalty. *See Moore*, 904 F.2d at 1234-35 (F. Gibson, Sr. J., dissenting) (citing cases). In *Walton*, the Court approved the Arizona Supreme Court's "statement that a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the

killing." *Walton*, 110 S. Ct. at 3058 (quoting *State v. Walton*, 159 Ariz. 571, 587, 769 P.2d 1017, 1033 (1989)). The Court also expressed its continuing adherence to *Proffitt v. Florida*, 428 U.S. 242 (1976), *see Walton*, 110 S. Ct. at 3058, wherein a plurality of the Court approved Florida's judicial definition of an " 'especially heinous, atrocious or cruel' "crime as a " 'conscenceless or pitiless crime which is unnecessarily torturous to the victim.' "*Proffitt*, 428 U.S. at 255-56 (quoting *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied sub nom. Hunter v. Florida*, 416 U.S. 943 (1974)). Though state courts must strive to limit the sentencing body's discretion, they are not required to (and probably cannot) eliminate all subjective considerations. Aggravating factors need not be defined with "mathematical precision;" they need only be defined sufficiently to provide "meaningful guidance to the sentencer." *Walton*, 110 S. Ct. at 3058. Therefore, our analysis should not be based on individual words, but on the state courts' pronouncements taken as a whole.

The Nebraska Supreme Court, prior to Moore's sentencing, had limited subsection d " 'to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence.' The standard encompasses acts which are totally and senselessly bereft of any regard for human life." *State v. Stewart*, 197 Neb. 497, ___, 250 N.W.2d 849, 864 (1977) (quoting *State v. Simants*, 197 Neb. 549, ___, 250 N.W.2d 881, 891, *cert. denied* 434 U.S. 878 (1977)). The court's attempt to label various aspects of Nebraska's scheme as "objective" or "subjective" based on the presence of certain adverbs and adjectives, *see Moore* 904 F.2d at 1230, has resulted in unnecessary semantic endeavors; after all,

the standards approved in *Walton* contain adverbs, adjectives, and other words of subjective meaning.

The basis for my dissent is further supported by the factual circumstances of this case. Moore killed two blameless and hapless cab drivers in less than one week. On both occasions, the killings were planned as part of a larger scheme to rob the victim-drivers. Moore called taxis from a phone booth, then hid nearby so that he could "determine whether the driver would be a suitable victim, *i.e.*, not too young, since the defendant stated that it was easier for him to shoot an older man rather than a younger man nearer his own age." *State v. Moore*, 210 Neb. 457, ___, 316 N.W.2d 33, 37 (1982). If the driver was "too old," Moore simply did not identify himself as the fare. If the driver was not "too old," Moore carried out his preconceived plan to rob and murder the driver. If a senseless murder for lucre could ever be deemed cruel and atrocious, certainly this is such a murder.

After comparing the Court-approved formulations to the Nebraska Supreme Court's definitions, I fail to see any constitutional vagueness or deficiency in the Nebraska law. If Arizona's and Florida's judicial narrowing passes constitutional muster, so too should Nebraska's. For these reasons, I believe rehearing should be granted so that we can further consider this case in light of *Walton* and *Lewis*.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-2584NEL
No. 88-2679NEL

Carey Dean Moore,	*	Order Denying
	*	Petition for
Appellee,	*	Rehearing and
vs.	*	Suggestion for
Harold W. Clarke,	*	Rehearing En
	*	Banc.
Appellant.	*	
* * * * *	*	(Filed
Carey Dean Moore,	*	Dec. 30, 1991)
	*	
Appellant,	*	
vs.	*	
Harold W. Clarke,	*	
	*	
Appellee.	*	

Appellant/Cross-Appellee's suggestion for rehearing en banc has been considered by the court and is denied by reason for the lack of a majority of the active judges voting to rehear the case en banc. Judges Fagg, Bowman, Beam and Loken voted to grant rehearing en banc.

Petition for rehearing by the panel is also denied.

December 12, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Ganz

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2584/2679NE

Carey Dean Moore,	*	Appeal from the
	*	United States
Appellee/	*	District Court for
Cross-Appellant,	*	the District of
v.	*	Nebraska.
	*	
Harold W. Clarke,	*	(Filed
	*	Dec. 30, 1991)
Appellant/	*	
Cross-Appellee.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 25, 1990

/s/ Michael E. Ganz

A true copy:

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit
MANDATE ISSUED DECEMBER 27, 1991

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2584
No. 88-2679

Carey Dean Moore,	*	Appeal from the
	*	United States
Appellee/	*	District Court for
Cross-Appellant,	*	the District of
v.	*	Nebraska.
Harold W. Clarke,	*	
	*	(Filed
Appellant/	*	Jan. 27, 1992)
Cross-Appellee.	*	

Filed: January 23, 1992

ORDER

The motion to recall the mandate is granted in order that the State may file a petition for certiorari with the United States Supreme Court. The mandate shall not be issued again until the time for filing the petition has expired and if a petition shall be filed, issuance of the mandate will be stayed until such time as the Supreme Court has entered an order finally disposing of the case.

A true copy.

Attest: /s/ Michael E. Ganz

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

NO. 91-1491

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

HAROLD W. CLARKE, DIRECTOR,
NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioner,

vs.

CAREY DEAN MOORE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, subject to the following amplification.

The statement on page 4 of the Petition that "The [sentencing panel] found no statutory mitigating circumstances to exist and no additional evidence offered in mitigation which would, on balance, render a sentence of death inappropriate in either case" is misleading to the extent that it implies the existence of no mitigating circumstances. While the sentencing panel did not find the existence of any statutory mitigating factors, it specifically held: "The sentencing panel finds that the family background and upbringing of the defendant are entitled to consideration as a mitigating factor in the determination of punishment to be imposed in this case, but the panel further concludes that this mitigating factor is not of sufficient weight to outweigh the aggravating circumstances which have been found to exist beyond a reasonable doubt in this case." Petition, at 93a. As indicated by the sentencing panel's discussion, Nebraska is a "weighing state." Neb. Rev. Stat. §29-2522 (Reissue 1989). See Stringer v. Black, 60 U.S.L.W. 4214 (March 10, 1992).

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

The issue is whether the lower courts correctly held unconstitutional Nebraska's facially vague aggravating circumstance, "the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence," under the Eighth Amendment. Without contest, the language is facially vague. The United States Court of Appeals found further that the Nebraska Supreme

Court had failed to narrow it by construction to channel the sentencers' discretion "so as to minimize the risk of wholly arbitrary and capricious action" as required under Gregg v. Georgia, 428 U.S. 153 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980); and Maynard v. Cartwright, 486 U.S. 356 (1988).

Petitioner seems now to recast this familiar issue into two new claims or propositions not ruled upon below: (1) the facially vague aggravating factor may be excused even without a meaningful "channelling" construction in a judicial-sentencing state such as Nebraska; and (2) aggravating factors and their construction by state courts should be judged constitutionally acceptable despite their containing some degree of subjectivity. Those issues are fictional "straw men," and both derive from a misleading characterization of the grounds actually relied on below. The first would distort two decades of death penalty jurisprudence. The second may well be true in some cases, but is utterly beside the point in this case. The two arguments are efforts to pull the focus away from the routine, settled analysis upon which the case was correctly decided by both the courts below.

From this case's inception, the fundamental issue has been the Nebraska Supreme Court's construction of the admittedly facially vague aggravating circumstance found at Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989), which provides "the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."

In its several efforts to breathe content into the generalized pejoratives announced in the statute, the Nebraska Supreme Court has interpreted § 29-2523(1)(d) to state two disjunctive standards which, alone or together, can operate to aggravate a first degree

murder conviction to death eligibility. In the direct appeal from Respondent's conviction and sentence, the Nebraska Supreme Court said:

> Aggravating circumstance (1)(d) of § 29-2523 literally, and as interpreted by this court, describes in the disjunctive two separate circumstances which may operate in conjunction with or independent of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the "pitiless crime which is unnecessarily tortuous to the victim" and to cases where torture, sadism, or the imposition of extreme suffering exists. State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977). In this case the sentencing panel found that aggravating circumstance did not exist. We agree. The second circumstance pertains to the state of mind of the actor. In State v. Stewart, supra, we said the second instance indicates a situation "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence" (syllabus of the court), and in State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977), it indicates a state of mind "totally and senselessly bereft of any regard for human life" (syllabus of the court). The sentencing panel found the second circumstance did apply.

State v. Moore, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982). See Petition at 51a-52a.

The sole, narrow issue involved in this case is whether the gloss placed on the "manifested exceptional depravity by ordinary standards of morality and intelligence" aggravating circumstance by the Nebraska Supreme Court as of the time Respondent was sentenced provided sufficient definitional content to allow that circumstance to aggravate his sentence, consistent with the Eighth Amendment. The United States District Court for the District of Nebraska has consistently upheld the constitutionality of the first "prong" of this aggravating circumstance, as limited by construction, and has also consistently held unconstitutionally vague the second "prong." Moore v. Clarke, 904 F.2d 1226, 1229, n.5 (8th Cir. 1990). See also, Harper v. Grammer, 895 F.2d 473, 478 (8th Cir. 1990) **aff'ing**. 654 F.Supp. 515 (D. Neb. 1987); Holtan v. Black, 838 F.2d 984

(8th Cir. 1988). The decision of the Court of Appeals in this case correctly affirms the longstanding analysis of the District Court. The writ should be denied.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH PROFFITT V. FLORIDA, WALTON V. ARIZONA, OR LEWIS V. JEFFERS

Respondent's claim that the Court of Appeals' decision conflicts with Proffitt v. Florida, 428 U.S. 242 (1976) is plainly wrong.

In Proffitt, this Court approved generally the then-new Florida capital sentencing statutes. The three-Justice plurality opinion announcing the judgment of the Court rejected the argument that the Florida aggravating circumstance that the murder was "especially heinous, atrocious, or cruel" was unconstitutionally vague, based on the Florida Supreme Court's construction which limited application of that aggravator to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 428 U.S. at 255-56.

That "torture" construction had first been announced in State v. Dixon, 283 So.2d 1 (1973). See Proffitt, 428 U.S. at 255. The Nebraska Supreme Court adopted the Dixon construction, approved in Proffitt, as to the first "prong" of § 29-2523(1)(d) in its initial review of Nebraska's post-Furman death penalty statutes. See State v. Stewart, 197 Neb. 497, 522-23, 250 N.W.2d 849, 862 (1977); State v. Rust, 197 Neb. 528, 538-39, 250 N.W.2d 867, 874 (1977). But both the original sentencing panel and the Nebraska Supreme Court unequivocally found that "prong" not applicable in Respondent's case. State v. Moore, 210 Neb. at 470-71, 316 N.W.2d at 41; Petition at 51a-52a. The Petitioner has conveniently omitted that holding from the lengthy quotation contained on page 7 of the Petition.

Thus, the limiting construction approved by this Court in Proffitt was determined by both the sentencing panel and the Nebraska Supreme Court not to apply in Respondent's case. For that reason, Proffitt is inapposite, and nothing in the Court of Appeals' opinion contravenes Proffitt.

Similarly, the decision of the Court of Appeals is wholly consistent with both Walton and Jeffers.

The original panel opinion was filed on May 25, 1990. Petition at 1a. While petitioner's petition for rehearing and suggestion for rehearing en banc was pending, this Court decided Walton v. Arizona, __ U.S. __, 110 S.Ct. 3047 (1990) and Lewis v. Jeffers, __ U.S. ___, 110 S.Ct. 3092 (1990). Petition at 101a. The parties were directed by the Court to brief the impact of Walton and Jeffers, on the panel's decision. Petition at 101a. The opinion denying rehearing by the panel specifically notes, "As we are satisfied that our earlier opinion is consistent with Walton and Jeffers, we deny the Warden's petition for rehearing." Petition at 101a.

The opinion denying rehearing by the panel continues:

> We first observe that Jeffers reasserts the requirement that a state "'channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."'" Jeffers, 110 S.Ct. at 3099 (quoting Godfrey v. Georgia, 446 U.S. 420, 428 (1980)). Walton defines our procedure in such cases as follows:
>
> > When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined

> the vague terms and if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide some guidance to the sentencer. In this case, there is no serious argument that Arizona's "especially heinous, cruel or depraved" aggravating factor is not facially vague. But the Arizona Supreme Court has sought to give substance to the operative terms, and we find that its construction meets constitutional requirements.

110 S.Ct. at 3057 (emphasis in original).

> Our original opinion followed precisely this formula, examining first the question of whether the Nebraska statute's language was too vague to provide guidance to the sentencer, and then determining whether the Nebraska courts had narrowed the statutory language by construction.

Petition at 101a-102a. That analysis is correct, and counsels in favor of denying the writ.

III. THE FACT THAT RESPONDENT'S DEATH SENTENCE WAS IMPOSED BY A PANEL OF JUDGES RATHER THAN A JURY IS NOT RELEVANT TO THE ISSUE INVOLVED IN THIS CASE

Petitioner takes the remarkable position that "the logic of Maynard and Godfrey has no place in the context of sentencing by a trial judge." Petition at 10. Nothing in this Court's capital sentencing jurisprudence so holds.

Walton, in regard to this question, stands only for the proposition that judges acting as capital sentencers "are presumed to know the law and apply it in making their decisions." 110 S.Ct. at 3057. "If the Arizona Supreme Court has narrowed the definition of the 'especially heinous, cruel or depraved' aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition." Id. (Emphasis added.)

Here, the Walton presumption is irrelevant because the sentencing panel, in fact, expressly applied the construction of the aggravator previously adopted by the Nebraska Supreme Court. See Petition at 78a-79a; compare Moore v. State, 210 Neb. at 470, 316 N.W.2d at 41, Petition at 51a-52a. Where the sentencing judges, in fact, apply the extant appellate gloss, the Walton presumption adds nothing to the analysis.

Rather, the question raised by this case and decided by the Court of Appeals is whether the construction placed on the second "prong" of the aggravating circumstance by the Nebraska Supreme Court in fact limited or narrowed the unconstitutionally vague language set out in the statute. The Court of Appeals held that it did not: "In conclusion, we believe that the body of law developed by the Nebraska Supreme Court construing the challenged statute provides insufficient guidance to a sentencing body called upon to determine whether a particular murder 'manifested exceptional depravity.'" 904 F.2d at 1233; Petition at 19a. After reviewing its earlier decision in light of Walton, the Court of Appeals reaffirmed that conclusion. Petition at 103a, 106a.

Godfrey and Maynard stand for the basic proposition, first announced in Gregg v. Georgia, 428 U.S. 153 (1976), that the use of a vague, imprecise aggravating circumstance fails to channel a sentencer's discretion in a meaningful way and thus results in arbitrary and capricious application of the death penalty, in violation of the Eighth Amendment. See Stringer v. Black, 60 U.S.L.W. 4214, 4216 (March 9, 1992). Maynard implies, and Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. 313, (1990) holds, that an appellate construction intended to limit a facially vague aggravating circumstance must in fact narrow and give content to the vague statute. Walton affirms all of these rules, but presumes that sentencing judges are aware of a limiting construction previously adopted by a state appellate court.

When Furman v. Georgia, 408 U.S. 238 (1972), found the death penalty was unconstitutional as then administered, it was because "Juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die." Id. at 248 (Douglas, J., concurring) (emphasis added). See similar references id. at 253, 255 (Douglas, J.); 391 (White, J.) 400 (Burger, CJ., dissenting). Throughout the several opinions, it is clear that both jury and judicial discretion was deemed unconstitutionally "untrammeled."

No case decided by this or any other court holds that a constitutionally defective aggravating circumstance which has not been narrowed by construction in a manner consistent with the Constitution may survive Eighth Amendment analysis merely because the capital sentencing is performed by a judge or judges. Yet, that appears to be petitioner's claim. That claim should be rejected and the petition denied.

IV. THE COURT OF APPEALS DID NOT APPLY ANY IMPROPER STANDARD IN DETERMINING VAGUENESS

Petitioner's complaint that the Court of Appeals improperly struck the aggravating circumstance because of the "subjective" nature of the construction adopted by the Nebraska Supreme Court mischaracterizes the actual decision of the Court of Appeals.

It is true that both the District Court and the Court of Appeals held that a state must "channel the Sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death." 904 F.2d at 1232, n. 7. In so doing, however, the Court of Appeals was merely applying the law announced by this Court in Gregg v. Georgia, 428 U.S. 153, 198 (1976), and reaffirmed in Godfrey v. Georgia, 446 U.S. 420, 428 (1980); and Lewis v. Jeffers, ___ U.S. ___, 110 S.Ct. 3092, 3099 (1990). See also Mills v.

Maryland, 486 U.S. 367, 374 (1988) (Sentencer's discretion "must be guided appropriately by objective standards").

The Nebraska Supreme Court has likewise recognized its obligation to apply the standard established in Gregg. See State v. Simants, 197 Neb. 549, 563, 250 N.W.2d 881, 890 (1977); State v. Palmer, 224 Neb. 282, 320, 399 N.W.2d 706, 732 (1986) (adopting new definition for depravity "prong," and noting that "both the phrase 'especially heinous, atrocious, cruel' and the phrase 'manifested exceptional depravity by ordinary standards of morality and intelligence' provide objective standards in imposing the death penalty. . . .").

The Court of Appeals can hardly be faulted for following a legal standard consistently adhered to by this Court. Moreover, the Court of Appeals simply did not hold "that an appropriately defined aggravating circumstance cannot be based upon the sentencing entity's determination of subjective factors such as the killer's state of mind," as the petition misleadingly suggests. Petition at 13.

As noted by the Court of Appeals, "the sole issue raised by the State in this appeal is whether the phrase 'manifested exceptional depravity by ordinary standards of morality and intelligence,' contained in section 29-2523(1)(d), is unconstitutionally vague as written and construed by the Supreme Court of Nebraska." 904 F.2d at 1228. Contrary to Petitioner's claim, the Court of Appeals understood its "task" to be:

> to determine whether the Supreme Court of Nebraska has construed the "exceptional depravity" language in a manner which directs and limits the discretion of the sentencing body "so as to minimize the risk of wholly arbitrary and capricious action," [Gregg] at 189, 96 S.Ct. at 2932, and provides a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." id. at 188, 96 S.Ct. at 2932 (quoting Furman, 408 U.S. at 313, 92 S.Ct. at 2764 (White, J., concurring)).

904 F.2d at 1229. Indeed, the Court of Appeals expressly disclaimed any intent to decide the claim Petitioner accuses it of deciding wrongly. See 904 F.2d at 1232, n. 7 ("We believe that this is an issue which we need not explore"). In considering the Petitioner's rehearing request in light of Walton and Jeffers, the Court of Appeals adhered to its earlier analysis and decision. Petition at 104a.

The constitutional defect inherent in the construction of this aggravator at the time Respondent was sentenced is not that it focused on the defendant's state of mind; rather, the defect is that the aggravator was not focused at all. The "construction" was every bit as vague and imprecise as the statutory language itself. See Shell v. Mississippi, 498 U.S. at __, 111 S.Ct. at 313. The issue resolved by the Court of Appeals, while important to the parties, is one this Court has reviewed a half-dozen times over the last 16 years. The Court need not revisit it.

V. THE COURT OF APPEALS' DISCUSSION OF STATE V. PALMER WAS INVITED BY THE ARGUMENT MADE BY PETITIONER

The final complaint Petitioner advances against the Circuit Court's decision relates to the Court's consideration of the construction of the "exceptional depravity" aggravating circumstance adopted in State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

Such consideration was invited by the Petitioner. The Petitioner's brief in the Circuit Court argued that the Palmer construction was constitutionally sufficient and controlled resolution of this case, despite the fact that the Palmer construction was not adopted until more than six years after Respondent's sentence was imposed. See 904 F.2d at 1231. This "troubling" argument led the Circuit Court to consider the Palmer decision. Compare, Stringer v. Black, 60 U.S.L.W. 4214, 4218 (1992) ("It is a fiction for the State to contend that in 1984 its courts relied on a 1988 decision"). That con-

sideration merely reinforced the Court's decision that the construction of the aggravator in existence at the time Respondent was sentenced was insufficiently precise. Id.

In its brief on rehearing, the State revamped its approach to Palmer. Instead of arguing merely that Palmer cures all vagueness problems, the Petitioner took the position that Palmer's oblique reference to Respondent's case amounted to a reweighing under Clemons v. Mississippi, 494 U.S. 738 (1990). The Circuit Court implicitly rejected this cynical claim, and again reaffirmed its previous conclusion that Palmer's abandonment of the construction under which the "exceptional depravity" aggravator was found to apply to Respondent's case buttressed the conclusion that such original construction was unconstitutionally vague. See Petition at 104a. The Circuit Court did, however, note that "any remand will require consideration of Clemons. . . ." Petition at 105a.

The Circuit Court's response to Petitioner's Palmer-based argument is correct and, given Petitioner's position before the Circuit Court, unavoidable. That Petitioner is dissatisfied with the resolution of an issue he injected into the case provides no basis for granting a writ of certiorari.

CONCLUSION

The petitioner has offered no good reason for this Court to review the decision of the Court of Appeals. The Petition for Writ of Certiorari should be denied.

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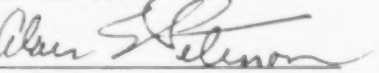
By: 

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